

APPENDIX

Supreme Court, U. S.
FILED
MAY 24 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-5325

BEN EARL BROWDER, PETITIONER

v.

DIRECTOR, DEPARTMENT OF CORRECTIONS OF ILLINOIS,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 7, 1976
CERTIORARI GRANTED JANUARY 25, 1977

INDEX

	Page
Docket Entries, District Court.....	1
Docket Entries, Court of Appeals.....	3
Petition for Writ of Habeas Corpus.....	4
Exhibit to Petition, consisting of opinion of the Illinois Appellate Court, <i>People v. Browder</i> , No. 56827 (July 2, 1973)	7
Exhibit to Petition, consisting of excerpts of "Petition for Appeal as a Matter of Right, or in the Alternative, for Leave to Appeal," <i>People v. Browder</i> , No. 46103, Illinois Supreme Court, appeal denied November 29, 1973	16
Excerpts of State Court Record, <i>People v. Browder</i> , Circuit Court of Cook County, Illinois, Ind. No. 71-1081.....	17
Motion to Suppress Statements.....	17
Testimony at Hearing on Motion to Suppress Identifica- tion Testimony	19
Excerpts of testimony of Johnnie Mae Johnson.....	19
Excerpts of testimony of Martin Conroy.....	21
Excerpts of testimony of Chris Ahern.....	25
Testimony at Hearing on Motion to Suppress Oral Statements	27
Excerpts of testimony of Martin Conroy.....	27
Excerpts of testimony of John Toughy.....	34
Excerpts of testimony of Francis O'Driscoll.....	39
Excerpts of testimony of Dan Thomas.....	42
Arguments of counsel.....	46
Ruling on denial of motions to suppress.....	49
Proceedings at Trial.....	50
Opening Statement on Behalf of the Defendant.....	51
Excerpts of testimony of Martin Conroy.....	52
Excerpts of testimony of Chris Ahern.....	63
Excerpts of testimony of John Touhey.....	68
Excerpts of testimony of Stan Thomas.....	75
Excerpts of testimony of Francis O'Driscoll.....	78
Denial of motion for directed finding at close of the prosecution's case	83
Excerpts of testimony of Ben Earl Browder.....	84
Excerpts of closing argument by the prosecution....	98
Waiver of closing argument by defense counsel.....	101

	Page
Return of jury verdicts.....	101
Arguments on motion for new trial.....	101
Ruling on denial of motion for new trial.....	104
Memorandum Opinion, March 7, 1975, on order staying proceedings pending disposition of state collateral proceedings	105
Opinion of the Illinois Appellate Court affirming the denial of collateral relief, <i>People v. Browder</i> , No. 60582, June 2, 1975	106
Order, October 21, 1975, granting petition Memorandum Opinion, October 21, 1975, on order granting petition for writ of habeas corpus.....	110
Motion to Further Stay the Execution of the Writ of Habeas Corpus and to Conduct an Evidentiary Hearing.....	118
Order, December 8, 1975, granting stay of execution pending evidentiary hearing	120
Order, December 12, 1975, setting cause for evidentiary hearing	121
Petitioner's Motion to Vacate Orders.....	122
Transcript of Proceedings of Evidentiary Hearing, January 7, 1976	123
Excerpts of testimony of Jim Newsom.....	124
Excerpts of testimony of Stan Thomas.....	129
Excerpts of testimony of Martin Conroy.....	138
Excerpts of testimony of Lucille Browder.....	149
Excerpts of testimony of Tyrone Browder.....	152
Exhibits Introduced at Hearing.....	154
Respondent's Exhibit 1 (police report of Jim Newsom)...	154
Petitioner's Exhibit 2 (police report of Stan Thomas)....	156
Petitioner's Exhibit 3 (police report of Martin Conroy) ..	159
Order, January 26, 1976, denying motion to reconsider.....	161
Notice of Appeal.....	162
Order, January 30, 1976, Court of Appeals, denying motion to stay execution of writ.....	163
Order, April 28, 1976, Court of Appeals, reversing the order granting the writ of habeas corpus.....	164
Order, June 18, 1976, Court of Appeals, denying petition for rehearing	169
Petitioner's Motion that a Decision by Unpublished Order Be Issued as a Published Opinion.....	170
Order, July 9, 1976, Court of Appeals, denying motion to issue as published opinion.....	172
Order of Supreme Court of the United States Granting Motion for Leave to Proceed in Forma Pauperis and Granting Petition for Writ of Certiorari.....	173

SUMMARY OF DOCKET ENTRIES

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, No. 75 C 69

DATE OF ENTRY	TEXT
1/8/75	File petition for writ of habeas corpus
2/11/75	File record, <i>People of the State of Illinois v. Ben Browder</i> , Circuit Court of Cook County, Criminal Division
3/11/75	Enter order dated March 7, 1975: Order proceedings are stayed until such time as the Illinois court rules or dismisses petitioner's application for state collateral relief.
3/17/75	Enter order dated March 14, 1975: Petitioner's motion to declare that voluntary dismissal of petitioner's pending state court appeal from a denial of state post-conviction relief will not be a conscious by-pass of an available state remedy, and will satisfy the exhaustion of state remedies requirement, denied. Case continued to April 15, 1975 for status.
6/17/75	File petitioner's motion to vacate stay
6/18/75	Enter order dated June 17, 1975: Petitioner's motion to vacate stay granted.
10/21/75	Enter order dated October 21, 1975: Order petition for Writ of Habeas Corpus granted. Respondent given sixty days to retry the petitioner or the Writ of Habeas Corpus shall be executed.
10/21/75	File memorandum opinion on order granting petition for writ of habeas corpus.
11/17/75	Enter order dated November 17, 1975: Respondent's motion for leave to withdraw the state court record is granted.
11/19/75	File respondent's motion to further stay the execution of the writ of habeas corpus and to conduct an evidentiary hearing.
12/15/75	Enter order dated December 8, 1975: Before the court is the respondent's motion for a stay of the execution of a writ of habeas corpus.

DATE OF
ENTRY

TEXT

pus pending an evidentiary hearing on the determinative issue of probable cause. The respondent asserts that the state court record submitted to this court does not afford an opportunity for a complete examination of the crucial facts surrounding the arrest of the petitioner. The court notes that the argument was not raised by the respondent prior to the ruling in this cause. However, the court concludes that the request for an evidentiary hearing should not be denied solely because it is untimely. *Townsend v. Sain*, 372 U.S. 293 (1963); *United States ex rel. McNair v. New Jersey*, 492 F.2d 1307 (3d Cir. 1974); Accordingly the respondent's motion for stay of execution of writ is granted pending an evidentiary hearing on the issue of probable cause.

- 12/15/75 Enter order dated December 12, 1975: Evidentiary hearing in this matter set for January 5, 1976 at 10:30 a.m. Evidence and argument shall be specifically directed to the issue of probable cause to arrest.
- 12/19/75 File petitioner's notice of motion with motion to vacate orders and memorandum in support of said motion, attached.
- 12/22/75 Enter order dated December 19, 1975: Hearing—Petition for Writ of Habeas Corpus set for January 7, 1976 at 11 a.m.
- 1/8/76 Enter order dated January 7, 1976: On motion of respondent order respondent's motion to dismiss and motion for evidentiary hearing to stand as a return to petition. Evidence heard and concluded. Cause taken under advisement.
- 1/28/76 Enter order dated January 26, 1976: Following an evidentiary hearing and further argument by the parties the court finds that the writ of habeas corpus was properly issued on October 21, 1975. The motion to reconsider is therefore DENIED. Accordingly, the writ shall issue with execution stayed for five days pend-

DATE OF
ENTRY

TEXT

ing prompt filing of notice of appeal and application to the court of appeals for a further stay. The court further finds that petitioner's request for fees pursuant to 28 U.S.C. Section 1927 is not justified and is hereby DENIED.

- 1/27/76 File respondent-appellant's notice of appeal.

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT,
No. 76-1089

- 1/30/76 Enter order denying respondent-appellant's "emergency motion to stay execution of writ of habeas corpus pending appeal." Order that appeal be expedited in accordance with schedule set out.
- 2/27/76 Arguments heard.
- 4/28/76 File "unpublished order," not to be cited per Circuit Rule 28: Order granting the writ of habeas corpus is REVERSED.
- 5/5/76 Enter order granting motion of respondent-appellant to expedite the issuance of the mandate, and directing the Clerk of this Court to issue the mandate forthwith.
- 5/7/76 File petitioner's emergency motion to recall and stay mandate pending application for a stay to the circuit justice
- 5/10/76 Enter order denying emergency motion to recall and stay mandate.
- 5/11/76 File petition for re-hearing, suggestion that cause be reheard in banc, and emergency motion to recall and stay mandate.
- 5/26/76 Enter orders denying petitioner's emergency motion to stay and recall mandate and motion for enlargement from custody pending final disposition of appeal.
- 6/18/76 Enter order denying petition for rehearing.
- 6/28/76 File petitioner's motion that a decision by unpublished order be issued as a published opinion.
- 7/9/76 Enter order denying petitioner's motion that a decision by unpublished order be issued as a published opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA EX REL. BEN EARL BROWDER,	} 75C 69
<i>Petitioner,</i>	
—VS.—	
DIRECTOR, DEPARTMENT OF COR- RECTIONS, STATE OF ILLINOIS, <i>Respondent.</i>	

PETITION FOR A WRIT OF HABEAS CORPUS

Petitioner, by counsel, alleges the following:

1. Petitioner Ben Earl Browder is a state prisoner, confined in the custody of respondent, the Director of the Department of Corrections of the State of Illinois, at the Illinois State Penitentiary, Stateville Branch.

2. Petitioner's confinement is the result of a 4 to 15 year sentence imposed by the Circuit Court of Cook County from Indictment Number 71-1081 on August 27, 1971, after a jury had found petitioner guilty of the offense of rape.

3. Petitioner was represented by court appointed counsel at trial.

4. The judgement of the trial court was upheld by the Illinois Appellate Court, First District, on July 2, 1973, 13 Ill. App. 3d 198, 300 N.E. 2d 511 (1973) (abstract only) (slip opinion attached.)

5. On direct appeal, petitioner argued, *inter alia*, that the entirety of the evidence used against him at trial was the "tainted fruit" of his unlawful arrest; this claim was held to have been "waived" by the negligence of appointed trial counsel. (Slip opinion, p. 3-5.)

6. Leave to appeal was denied by the Illinois Supreme Court on November 29, 1973, case number 46103; in seeking discretionary review, petitioner argued, *inter alia*, that the appellate court had improperly applied the Illinois waiver rule. (Petition, p. 12-14, attached.)

7. Review on certiorari was not sought in the Supreme Court of the United States.

8. Petitioner, through present counsel, sought post-con-

viction relief in the Circuit Court of Cook County, PC No. 2612, urging, *inter alia*, the unlawful arrest claim referred to in paragraph 5 above, a claim arising from the absence of counsel at a post-arrest lineup, and a claim arising from the alleged failure of trial counsel to investigate petitioner's alibi defense. The post conviction petition was dismissed without an evidentiary hearing on December 13, 1973.

9. An appeal from the denial of post conviction relief is now pending in the Illinois Appellate Court, First District, No. 60582.

10. In the post-conviction appeal, the state has argued that all of petitioner's claims are barred by *res judicata*/waiver, and that the merits of petitioner's lineup claim have been explicitly rejected by the Illinois Supreme Court in prior cases. A copy of the state's brief is attached.

11. In the absence of an unexpected change in Illinois law, the Illinois Appellate Court will hold that petitioner's fourth amendment claim is barred by *res judicata*/waiver, and the state post-conviction remedy is an ineffective remedy for vindication of this claim.

Brief Statement of Claim

12. Petitioner's conviction rests solely upon the "tainted fruits" of his unlawful arrest.

Facts in Support of Claim

13. Petitioner, along with every adult male present in the Browder residence, was arrested on January 30, 1971, in order to "clear up an investigation." (R. 67) ["R. —" refers to pages in the transcript of proceedings at petitioner's state court trial.] This multiple suspect investigatory arrest was made without probable cause, without a warrant, and in the absence of any exigent circumstances, and was unlawful:

a. On January 31, 1971, one Martin Conroy, a police officer of the City of Chicago, received an assignment relating to the rape of one Sharon Alexander. (R. 31)

b. Upon checking his files, Conroy discovered some information relating to one Tyrone Browder, and telephoned the Browder residence. (R. 31)

c. During this telephone conversation, Conroy learned

that Tyrone Browder, along with his brother Ben Earl Browder, petitioner herein, was at home. (R. 170)

d. Thereafter, Conroy, accompanied by three other police officers, went to the Browder residence (R. 32), and there arrested all of the young, adult black males present. (R. 67).

e. At the time of making these arrests, the police officers realized that they did not have probable cause to arrest any one of the four youths, and advised the arrestees that they were being arrested for "investigation of rape." (R. 164-165).

f. The four arrestees were then transported to a police station, and placed in a lineup. (R. 33-34).

g. This lineup was first viewed by Sharon Alexander, who allegedly identified petitioner. (R. 33). Apparently this was a mis-identification, as criminal proceedings do not appear to have resulted from this "identification."

h. While petitioner was standing in this lineup, the police arranged for another rape victim to view the lineup, and one Johnnie Mae Johnson allegedly identified petitioner, (R. 34); this identification resulted in the conviction here under collateral attack.

i. After they had escaped identification, the three other persons arrested with petitioner were released. (R. 168).

j. After the lineup identification, petitioner allegedly made an inculpatory admission to Officer Conroy. (R. 52).

k. The totality of the evidence upon which petitioner's conviction is based is the testimony about the lineup identification, the alleged admissions, and a subsequent in-court identification, and this evidence is the "tainted fruit" of the underlying unlawful arrest.

WHEREFORE petitioner prays that the Court direct issuance of a writ of habeas corpus, directing that petitioner be released outright from state custody.

Respectfully submitted,
Kenneth N. Flaxman

Kenneth N. Flaxman
5549 North Clark Street
Chicago, Illinois 60640
312-728-3525
John T. Moran
407 Civic Center
Chicago, Illinois 60602
312-443-6350
Attorneys for Petitioner

IN THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

No. 56827

PEOPLE OF THE STATE OF ILLINOIS,
PLAINTIFF-APPELLEE,

v.

BEN E. BROWDER,
DEFENDANT-APPELLANT.

Appeal from
Circuit Court
Cook County.
Honorable
Philip Romiti,
Presiding.

(Opinion filed July 2, 1973)

MR. JUSTICE HALLETT delivered the opinion of the court:

After a jury trial on charges of armed robbery and rape, the defendant was found not guilty of armed robbery but guilty of rape, and was sentenced to four to fifteen years in the state penitentiary.

On his appeal the defendant contends, first, that his initial arrest without a warrant was illegal and that therefore his identification in a lineup, his alleged oral admissions following such identification and his in-court identification should have been suppressed as the poisoned fruits of that arrest and, second, that the prosecutor's comments, in his closing argument, on the failure of the defendant to produce witnesses in support of his alibi prejudiced him and deprived him of a fair trial.

Johnnie Mae Johnson testified that on January 30, 1971, at about 5:45 P.M., she was returning home from a local store when she saw a young man walking through an adjoining alley. She continued on beyond the alley and, after turning the corner, noticed the same man walking behind her. She continued walking and, when she got a door from her home, he grabbed her and forced her to go through a gangway and into a basement where he raped her. He also took her watch, some bus tokens and some change. He had a white bandage on his hand and wore a white tam and an earring in his left ear. She also observed his face and heard his voice, warning her not to call the police. She went directly home and immediately called the police. She was

taken to the County Hospital where she was examined. The intern's report showed sperm in the vaginal area.

[2] The next day the defendant and three other men were arrested, without a warrant, at his home in connection with an investigation of the rape of one Sharon Alexander and placed in a lineup. After Miss Alexander had identified the defendant and had left the room, the complaining witness here, Miss Johnson, also viewed the same lineup. She positively identified the defendant by his face and his voice. He also wore an earring in his left ear, had a bandage on his hand and had a white tam. The defendant then told Officer Conroy that he wanted to tell him something. After the officer had warned him of his right to remain silent and his right to counsel, the defendant told Conroy and Officer O'Driscoll that he had raped Johnnie Mae Johnson but denied having a gun and denied raping Sharon Alexander. He also repeated his admission before Officer Thomas, a homicide investigator.

The defendant testified, in his own behalf, that he had left his home at about 5 o'clock on the evening of the crime to go to the store, that he was back home by 5:30 P.M. and that at 5:45 P.M., he was at home with his brother, his mother, his brother's girlfriend, one of his brother's partners and one of his partners. He denied raping or robbing Johnnie Mae Johnson and denied telling any police officer that he had raped her.

During the closing argument, the Assistant State's Attorney, after stating that the defendant is presumed innocent and that the burden of proof is on the State, which must prove his guilt beyond a reasonable doubt, mentioned the defendant's failure to produce as witnesses any of those persons in whose presence he claimed to have been at the time of the crime.

The jury found the defendant guilty of rape but not guilty of armed robbery.

In the written motion for a new trial, the defendant did not claim that his oral admissions should have been excluded or that the court erred in allowing the identification testimony but did claim that the State's Attorney's closing argument was inflammatory and prejudicial. On the oral argument of the motion, the defendant also argued that the identification testimony [3] was tainted by a suggestive lineup.

The motion for a new trial was denied, the defendant was sentenced to not less than four nor more than fifteen years in the penitentiary and this appeal followed.

Going now to the defendant's first contention—that his initial arrest without a warrant (in connection with another alleged rape) was illegal and that therefore his identification in the resulting lineup, his alleged oral admissions following his said identification and his later in-court identification should all have been suppressed as the poisoned fruits of that arrest—this contention was not raised in the trial court, either during the trial or in the motion or argument for a new trial.

In *People v. Harris*, 33 Ill. 2d 389, 211 N.E. 2d 693, the defendant, in the Supreme Court, for the first time contended that evidence used against him was the result of an illegal arrest and an unlawful search and seizure. In affirming, our Supreme Court, at pages 390-391, said:

"At the trial defendant urged a lack of proper identification of the defendant and claimed that he found the wallet on a C.T.A. bus. On this appeal, however, his sole argument is that the wallet in question was obtained by an illegal search and seizure pursuant to an illegal arrest. Despite the inadequate abstract filed, we have carefully examined the entire record and find that neither the defendant nor his counsel had at any time moved to suppress the evidence in question. We also find a complete lack of any objection to the admission of this evidence on the ground that it was illegally obtained or on any other specific ground.

"Defendant's post-trial motions for a new trial and in arrest of judgment are also devoid of any reference to the impropriety of the admission of this evidence. On this appeal much of defendant's argument is devoted to the alleged illegality of his arrest. This issue becomes important only if the evidence obtained thereby is properly objected to at the trial. It is well settled that this court will not consider the question of illegal search and seizure, even though pursuant to an illegal arrest, where it has not been raised [4] before the trial court. (*People v. Sotos*, 26 Ill. 2d 460; *People v. King*, 26 Ill. 2d 586; *People v. Brengettsy*, 25 Ill. 2d 228.) Justice will not be served by permitting a defendant to proceed through an entire trial without rais-

ing alleged error and then take advantage of such error on an appeal from an adverse judgment."

In *People v. Moore*, 43 Ill. 2d 102, 251 N.E. 2d 181, the Court, at page 106, said:

"* * * In that brief the defendant contends that his arrest was illegal and argues that the seizure of his articles was illegal. The defendant was represented at his trial by counsel and the alleged irregularity of the arrest and search was not presented to the trial court. Constitutional claims may, of course, be waived and the failure to assert this claim in the trial court makes it unnecessary to consider it here."

Again, in *People v. Nilsson*, 44 Ill. 2d 244, 255 N.E. 2d 432, the Court, at pages 246-247, said:

"Defendant next contends that the circumstances attending his arrest, his confession, and his consent to the search which produced the stolen goods were such as to require suppression of the confession and the recovered property. Defendant was arrested without a warrant and claims here for the first time that there was no probable cause for the arrest. Therefore, he argues, evidence adduced thereby was inadmissible as 'fruit of the poison tree.' Since this argument was not raised in his motion to suppress or at any time prior to this appeal, we find that the issue was waived. (*People v. Moore*, 43 Ill. 2d 102, 106.)"

And, more recently, in *People v. Burroughs*, 10 Ill. App. 3d 477, 294 N.E. 2d 325, this court, at page 478, said:

"Defendant contends that the search and seizure of three tires and rims from the trunk without a warrant was illegal and they cannot be used to support a conviction of a theft of property of the value of over \$150.00. Further, that the only proper evidence would be the one tire and rim in the back seat of the car. Since the value of this property would be less than \$150.00, the offense would be reduced from a felony to a misdemeanor.

"Defendant was represented by private counsel in the trial court and failed to move in that court for suppression of the three tires and rims. He urges that this question should be considered for the first time on

review in this court, by reason of Supreme Court Rule 615, as a plain error or defect affecting substantial rights of the defendant although not brought [5] to the attention of the trial court. We cannot agree. Under the facts of this case we feel bound by the rule that a reviewing court will not consider the question of illegal search and seizure where it has not been raised in the trial court. *People v. Harris*, 33 Ill. 2d 389, 211 N.E. 2d 693; *People v. Cassell*, 101 Ill. App. 2d 279, 243 N.E. 2d 363; *People v. Green*, 36 Ill. 2d 349, 223 N.E. 2d 101; *People v. Washington*, 45 Ill. 2d 477, 259 N.E. 2d 276; *People v. Moore*, 43 Ill. 2d 102, 251 N.E. 2d 181; *People v. Adams*, 41 Ill. 2d 98, 242 N.E. 2d 167."

We therefore conclude that since the propriety of his arrest (in another rape investigation) was not in any way raised in the trial court, it cannot now be raised here on appeal. We also doubt seriously that his identification in the lineup, his oral confessions after that identification and his positive in-court identification can be considered as the "fruits" of that arrest.

This brings us to the defendant's second contention—that the prosecutor's comments, in his closing argument, on the failure of the defendant to produce as witnesses any of those persons in whose presence he claimed to have been at the time of the crime prejudiced him and deprived him of a fair trial.

In his closing argument, the Assistant State's Attorney, after stating that the defendant is presumed innocent and that the burden of proof is on the State, which must prove his guilt beyond a reasonable doubt, mentioned the defendant's failure to produce as witnesses any of those persons (viz: his mother, his brother Tyrone, Tyrone's girlfriend, his brother's partner, Stanley Polk, and the defendant's partner, Milton Hale) in whose presence he claimed to have been at the time of the crime. The defendant gave these names at the end of his testimony, so that the State had no opportunity to call them as witnesses. Furthermore, the proof left no doubt whatsoever of his guilt. The victim had adequate opportunity, during the crime, to observe him and to hear his voice, she identified him positively by his [6] appearance and voice and, as she had described the rapist, he had a pierced left ear with an earring, had a bandage on his hand and wore a tam.

In such a situation, the case of *People v. Nilsson*, 44 Ill. 2d 244, 255 N.E. 2d 432, above cited, is persuasive. There our Supreme Court, at page 248, speaking through Mr. Chief Justice Underwood, said:

"The final point raised by defendant concerns the prosecutor's reference, during closing argument, to defendant's failure to support his alibi with the testimony of the alleged alibi witnesses. The authority in Illinois is conflicting on the question whether such comment is improper. (See *People v. Rubin*, 366 Ill. 195, 198; *People v. DeLardo*, 350 Ill. 148, 161-62; *People v. Munday*, 280 Ill. 32; *People v. Smith*, 74 Ill. App. 2d 458, 463-64; but see, *People v. Swift*, 319 Ill. 359, 365-66; *People v. Smith*, 105 Ill. App. 2d 8, 11-12; *People v. Sanford*, 100 Ill. App. 2d 101, 104-05.) There can be no question, however, as to the rule that improper remarks do not constitute reversible error unless they result in substantial prejudice to the accused. (*People v. Stahl*, 26 Ill. 2d 403, 406; *People v. Swets*, 24 Ill. 2d 418, 423; *People v. Berry*, 18 Ill. 2d 453, 458.) Since we are of the opinion that the prosecutor's remarks here were so minor that they could not have been a material factor in defendant's conviction, and therefore cannot constitute reversible error, we need not consider their propriety."

We therefore conclude that the prosecutor's remarks during his closing argument did not constitute reversible error in that they did not substantially prejudice the accused or deprive him of a fair trial.

We therefore affirm the judgment of the circuit court.

JUDGMENT AFFIRMED.

Burke, P.J., concurs.

Goldberg, J., specially concurring.

(Abstract only.)

[7] Mr. JUSTICE GOLDBERG, specially concurring:

I approve of the result reached and of the reasons stated in the above opinion. It demonstrates completely and effectively that the judgment appealed from should be affirmed. However, I wish to add the following as additional reasons requiring this result.

This record shows that defendant was quite ably repre-

sented in the trial court. His appointed counsel made motions for discovery; to suppress oral statements made by defendant; to reduce bail and to suppress evidence of his identification. These factors should impel us to presume a knowing waiver of any issue regarding legality of defendant's arrest.

In this regard, I would cite *People v. Montgomery*, 51 Ill. 198, 282 N.E.2d 138. There, the Supreme Court invoked the doctrine of waiver despite the youth of the defendant. (Defendant there was 17 years of age. Defendant in the case at bar was 18 when tried.) We note particularly that the Supreme Court described the arrest without warrant in *Montgomery* as harmless error, " * * * in the absence of a search and seizure issue, and in view of adequate Miranda warnings * * * ." (51 Ill. 2d at 202.) Furthermore, it has been held that where no evidence was seized at the time of defendant's arrest, any issue that may have arisen from a warrantless arrest " * * * was rendered moot when the defendant was indicted by the grand jury." *People v. Hyde*, 1 Ill. App. 3d 831, 845, 275 N.E. 2d 239.

As regards defendant's second point regarding improper final argument by the prosecutor, the background is shown in the above opinion. The record here shows, in addition, that defendant's testimony on direct examination consisted of no more [8] than nine answers to that number of questions put by his counsel. He did little more than deny categorically that he had raped and robbed the complaining witness and that he had admitted the rape to the police officers. Under these circumstances, the State was obliged to cross-examine defendant. Without such procedure the defendant would have had a completely unfair privilege and advantage. Throughout the entire cross-examination, which sought to ascertain where defendant was at the time of the commission of the crime and with whom, no objection was made by his diligent trial counsel. This cross-examination of defendant was entirely proper. (See *People v. Burris*, 49 Ill. 2d 98, 104, 273 N.E. 2d 605.) Therefore, it is clear that the jury knew very well, without comment by the prosecutor, the defendant's position was totally uncorroborated.

In a situation of this type, the comments by the prosecutor in final argument are patently lacking in significance. Furthermore, the evidence of guilt here is beyond reasonable

doubt and virtually overwhelming. There is a strong and positive identification of defendant; a clear-cut oral admission of guilt by him, corroborated by three police officers, made after complete Miranda warnings; and, finally, medical evidence substantiating the testimony of the complaining witness. The only scintilla of evidence to the contrary is defendant's own categorical denial. In this situation, the allegedly improper remarks by the State's Attorney were, "... of such a minor character that prejudice to defendant is not their probable result * * * ." *People v. Clark*, 52 Ill. 2d 374, 390, 288 N.E. 2d 363.

In addition, it may be stated here, beyond a reasonable doubt, that the error complained of did not contribute to the [9] verdict and the same verdict would have been returned in its absence. (*People v. Trice*, 127 Ill. App. 2d 310, 319, 262 N.E. 2d 276.) Under these circumstances, irrelevant and improperly suggestive testimony (*People v. Scott*, 52 Ill. 432, 441, 442, 288 N.E. 2d 478) and even error of constitutional dimension should be deemed harmless. *People v. Brown*, 51 Ill. 2d 271, 273, 281 N.E. 2d 682. See also *People v. Lucas*, 48 Ill. 2d 158, 162, 163, 269 N.E. 2d 285.

On oral argument, defendant cited *People v. Moore*, 9 Ill. App. 3d 231, 292 N.E. 2d 42. In that case, the second division of this court reversed a conviction where no objection was made to prejudicial closing argument in which the State's Attorney referred to the failure of defendant to support his alibi testimony, all elicited by cross-examination, by calling other witnesses. We note, however, that the court reached this result after examination of "the entire record" and it qualified the result reached by stating specifically that it was based "on the evidence in this case." (See 9 Ill. App. 3d at 232, 233.) Quite to the contrary, in the case at bar, an examination of the entire record here impels to the conclusion that the assailed final argument was not prejudicial and that the judgment appealed from should be affirmed.

Defendant urges that the final argument of the prosecutor may have misled the jury as regards the burden of proof. Not only did the prosecutor himself avoid this possible result, as shown by the above opinion, but the instructions of the court regarding burden of proof and presumption of innocence (State's Instruction No. 6, IPI-Criminal No. 2.03) and burden of proof on the issues in rape (State's Instruction No. 10, IPI-Criminal No. 9.03) were certainly sufficient to guide the jury properly in this regard.

[10] In this portion of the argument, defendant relies primarily on *People v. Weinstein*, 35 Ill. 2d 467, 220 N.E. 2d 432. That case is inapplicable here. As pointed out by the Supreme Court, the prosecutor there manifestly prejudiced the defendant by repeated assertions regarding the burden of defendant to introduce evidence to create a reasonable doubt of guilt. The court also pointed out other improper argument by the prosecutor. Furthermore, the prosecution in the *Weinstein* case was based upon circumstantial evidence.

Nor can defendant avail himself of his argument of inconsistency because the jury found him not guilty of robbery. Illinois adheres to the rule that logical consistency in verdicts is not necessary provided that the verdicts are not legally inconsistent. See *People v. Hairston*, 46 Ill. 2d 348, 361, 362, 263 N.E. 2d 840. Note also *People v. Lamb*, 10 Ill. App. 3d 935, — N.E. 2d — where the same argument was rejected where a jury found defendant not guilty of burglary but guilty of theft.

IN THE SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,
PLAINTIFF-APPELLEE,

—VS—

BEN E. BROWDER,
DEFENDANT-APPELLANT.

No. 46103

PETITION FOR APPEAL AS A MATTER OF
RIGHT, OR IN THE ALTERNATIVE,
FOR LEAVE TO APPEAL

• • •

III. *Points Relied upon for Reversal of the
Judgment of the Appellate Court*

• • •

Where a defendant was convicted solely on the basis
of evidence tainted by his unlawful arrest;

Where defendant's trial strategy was to suppress the
fruits of the unlawful arrest, and where defense counsel
elicited testimony showing that the arrest was made
without probable cause and without a warrant in a
situation requiring a warrant;

Where defense counsel inadvertently failed to pinpoint
the unlawful arrest as the basis of the motions to sup-
press the fruits of the arrest:

2. Is the Illinois waiver rule properly applied when it
denied defendant a fair opportunity to raise and have ad-
judicated on direct appeal his Fourth Amendment claims,
when the factual basis for these claims is clear from the
trial court record?

• • •

IN THE CIRCUIT COURT OF COOK COUNTY
CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS

—VS—

BEN E. BROWDER

Indictment No.
71-1081

MOTION TO SUPPRESS STATEMENTS

Now comes BEN E. BROWDER, by his attorney,
GERALD W. GETTY, Public Defender of Cook County,
through HARRY MISSIRLIAN, Assistant Public De-
fender, and moves this Honorable Court to suppress as evi-
dence herein any and all confessions, statements or admis-
sions of defendant made at the time of and after his arrest,
and as grounds therefor states as follows:

1. That defendant was arrested on Jan. 30, 1971 in the
vicinity of 4053 W. Monroe.

2. That prior to his interrogation at the time of his arrest,
or at any time thereafter, the defendant was not, properly
and adequately:

- a) Informed that he had a right to remain silent;
- b) Informed that anything he might say could be used
against him in court;
- c) Informed that he had a right to consult with a
lawyer;
- d) Informed that he had a right to have a lawyer with
him during his interrogation; and,
- e) Informed that if he was indigent he would nonethe-
less be provided with a lawyer if he so desired.

3. That any purported waiver of the above rights was not
made voluntarily, knowingly and intelligently.

4. That any and all confessions, statements or admissions
of the defendant, made at the time of and/or after his
arrest, were, therefore, elicited in violation of his Constitu-
tional Rights under the Fifth Amendment of the Constitu-
tion of the United States, (*Miranda v. Arizona*, 384 US 436.)

5. Petitioner further states that any statements elicited
from him were the direct or indirect result of "e/i/t/h/e/r
p/h/y/s/i/c/a/l o/r" mental coercion and were therefore,
involuntary.

WHEREFORE, defendant asks that this Honorable Court suppress as evidence herein any and all confessions, statements, or admissions, whether written or oral, inculpatory or exculpatory, made by him at the time of or subsequent to his arrest.

GERALD W. GETTY
Public Defender of Cook County

By: /s/ Harry Missirlian

By:
Assistant Public Defender
/s/ Ben E. Browder

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT—CRIMINAL DIVISION

(TITLE OMITTED IN PRINTING)

Report of Proceedings

[Testimony at hearings on motions to suppress, August 23, 1971, before the Honorable Philip Romiti, Judge. Patrick Driscoll and Richard Salas, Assistant State's Attorneys, appeared for the state; Harry Missirlian, Assistant Public Defender, appeared for the defendant.]

* * *

[2] THE COURT: We are proceeding first on what motion, gentlemen?

MR. MISSIRLIAN: Motion to suppress identification.

* * *

(Testimony of Miss Johnnie Mae Johnson, direct examination by defense counsel, Mr. Missirlian.)

* * *

[3] MR. MISSIRLIAN: Directing your attention to January 31, 1971, were you in the 11th District police station?

MISS JOHNSON: Was that a Sunday? Yes.

* * *

[5] Q. Did you view a lineup?

A. Yes.

* * *

[6] Q. Did somebody else view the lineup with you?

A. Yes.

Q. Do you remember that person's name or those persons?

A. Other than my mother I don't know the other persons' names.

Q. Was it a male or a female?

A. Females.

Q. At that time did you make an identification?

A. Yes.

P. And did this female also make an identification?

A. After I didn, yes.

Q. After you did?

A. Yes.

. . .

Q. When you made this identification did you identify the defendant in this cause, Ben Browder?

[7] A. Yes.

Q. And at that time did you have an occasion to observe whether Mr. Browder was wearing a cast or a bandage on his hand?

A. What do you mean?

Q. Well, was Ben Browder wearing a cast?

THE COURT: Did he have a cast or bandage on his arm?

THE WITNESS: Yes.

THE COURT: All right.

MR. MISSIRLIAN: Q. Did any of the other men in the lineup—were they wearing a cast or bandage on their arms?

A. No.

. . .

[8] Q. Do you remember how Mr. Browder was dressed on January 31st, 1971, at the police station?

A. Not exactly but I remember some things.

[9] Q. Well, could you tell us what you remember?

A. Khaki pants and the white tam and black coat. That is all.

Q. He was wearing that on January 31st at the police station?

A. Yes.

Q. And he had a green coat on, did you say? What color coat was he wearing?

A. On the day at the police station a black coat.

Q. A black coat?

A. Yes.

Q. And he was wearing a white tam at the police station?

A. Yes.

Q. When you say white tam would you describe to the Court what you mean?

A. Just a white hat with a little ball on the top.

Q. Was there anybody else in that lineup wearing a white tam?

A. Not a white tam but hats maybe.

Q. I didn't hear you.

A. No one else wearing a white tam.

. . .

(Testimony of Martin Conroy, direct examination by the prosecution, Mr. Salas.)

. . .

[29] MR. SALAS: What is your occupation, Mr. Conroy?

MR. CONROY: I'm a police officer assigned to the Youth's Division.

[30] Q. How long have you been employed—are you employed by the City of Chicago?

A. Just over five years.

Q. That is for the City of Chicago Police Department, is that correct?

A. Yes, sir.

Q. Now Officer, directing your attention to the date of January 29th, 1971, did you have occasion to have an assignment at that time?

A. Regarding this incident I received the assignment on the 31st.

Q. Did you receive an assignment on January 29th, 1971?

A. No, sir. I was assigned to a rape that occurred on the 29th—

MR. MISSIRLIAN: Objection.

THE COURT: Sustained.

MR. SALAS: Q. Were you assigned on January 30th?

A. 31st.

Q. Where, if anywhere, did you go, Officer?

A. I went to my files at the Youth Division at the 11th District.

Q. And at that time did you have occasion to—what, if anything, did you do after that?

[31] A. Well, I had information regarding a rape of a Sharon Alexander and a possible offender by the name of Browder.

Q. After this possible offender by the name of Browder, you received this information, what, if anything, did you do then?

A. I checked my file to see if I had a listing and I had Tyrone Browder who lived at 4053 on Monroe.

Q. Did you have occasion to call the home of one Tyrone Browder?

A. Yes, I did.

Q. And who, if anyone, did you talk to on the phone?

A. I talked to the mother, Mrs. Browder.

Q. And did that person identify herself?

A. Yes, sir.

Q. Did you have occasion to inquire at that time as to the whereabouts of one Tyrone Browder?

A. Yes, I did.

Q. And what, if anything, did you ask this person?

MR. MISSIRLIAN: Your Honor, I'm going to object. I don't know what—this is beyond the scope.

THE COURT: I don't know where he is going. I [32] will overrule the objection. I presume it is going to be relevant. I assume you are going to tie it in?

MR. SALAS: Yes.

THE COURT: We have a motion to suppress identification. Proceed.

MR. SALAS: Q. Now did you have occasion to go to the Browder residence?

A. Yes, I did.

Q. And at that time did you have occasion to see the defendant?

A. Yes, sir.

Q. And is this person who you saw at that residence present in this court room?

A. Yes.

Q. Will you indicate who he is?

A. With the black jacket on at the table.

Q. Did you arrest him at that time?

A. Yes, I did.

Q. And did you then take him into custody?

A. Yes, sir.

Q. Now when you took him into custody approximately what time was that?

A. I believe it was approximately 6:00 o'clock, 5:30, 6:00 o'clock in the evening on the 31st.

[33] Q. When you went to the Browder residence did you arrest anyone other than Ben Browder?

A. Yes, sir, I arrested his brother Tyrone.

Q. And when you went to the station were you present at the time that a lineup was conducted?

A. Yes, sir, I was.

Q. Was there any identification made during the time that you were present?

A. Yes, sir, there was.

Q. And who, if anyone, made an identification at that time?

A. Sharon Alexander was the first to view the lineup and she identified Ben earlier, Ben Browder earlier and touched him as indicating he was the one [34] and then we asked her to leave the room and we brought Johnnie Mae Johnson in and she identified Ben Browder and she touched him.

MR. SALAS: Q. Officer, directing your attention back to the time you called the Browder residence. What, if anything, did you ask Mrs. Browder?

MR. MISSIRLIAN: Your Honor, I'm going to object.

MR. SALAS: Your Honor, I'm going to tie this up.

THE COURT: Overruled.

MR. SALAS: Q. What, if anything, did you ask Mrs. Browder?

A. I asked Mrs. Browder if her son was home.

Q. Which son?

A. Tyrone.

Q. And did you say anything else?

[35] A. Yes, sir. I said that it was regarding an assault on a girl.

Q. What, if anything, did Mrs. Browder say to you?

A. Mrs. Browder said that she didn't think it would be Tyrone but it might possibly be her son Ben Earl.

Q. Now directing your attention to the lineup, do you remember how many people were in that lineup?

A. There were five suspects in the lineup.

Q. And were there any—were the people in the lineup—would you describe their heights, their respective heights?

A. About five-seven to five-nine.

Q. Were they all approximately the same height?

A. Yes, sir, one or two a little taller and three of them were about the same height.

Q. Were they approximately the same age?

A. Yes, sir.

Q. Were they all approximately the same race?

A. Yes, sir, they were.

[36] CROSS EXAMINATION

By MR. MISSIRLIAN :

Q. Officer Conroy, what was the date that you went over to the Browder residence?

A. It was the 31st, sir.

Q. The 31st, this is the day also of the lineup?

A. The day of the arrest, yes, sir.

Q. And you arrested four individuals at the [37] Browder residence?

A. Yes, sir.

Q. What did you charge each four with?

A. While at the residence I told Mrs. Browder that we had a case of rape—

Q. No, I didn't ask you that. I asked you what did you charge them with?

A. They were investigation of rape.

Q. And did you tell each four of these individuals at the home that they were under arrest for rape?

A. Yes, sir, I took them into custody.

Q. And were you with other officers, other police officers when you were there?

A. Yes.

Q. And when you transported these four men to the police station were they handcuffed?

A. No, sir.

[38] Q. Now you testified that Miss Alexander and Miss Johnson viewed the lineup separately?

A. Yes, sir, they did.

Q. And Miss Alexander was the first?

A. Yes.

Q. Did they ever view the lineup together?

A. No, sir.

Q. To your knowledge did Miss Johnson ever talk to Miss Alexander or see Miss Alexander before the lineup?

A. I was upstairs assisting, conducting the lineup when the Alexander family come in. I had them sit down in the lobby of the first floor and we expected Johnnie Mae Johnson and her family and I don't know if they talked together or not.

Q. But in any event they didn't view the lineup together?

A. No, sir, they did not.

[39] Q. And when you arrested Mr. Browder at his home was his hand, his right hand in a bandage?

A. Yes, sir, it was.

Q. And when this lineup was conducted was his right hand also in a bandage?

A. Yes, sir, it was.

Q. Was any other person in that lineup, were they wearing a bandage on their right hand?

A. No, sir.

[40] Q. Now when you went to the Browder residence you went there specifically to talk to Tyrone, Ben's brother?

A. After the conversation with his mother I went there to talk to both of them, Ben Earl and Tyrone.

(Testimony of Chris Ahern, direct examination for the prosecution by Mr. Salas.)

[41] Q. Would you give us your full name and spell your last name, sir?

A. Officer Chris Ahern, A-h-e-r-n.

Q. What is your occupation?

A. Police officer of the City of Chicago.

Q. How long have you been employed?

A. Nine years.

Q. Directing your attention to the date of January 31st, 1971, were you working on that day?

A. Yes, I was.

Q. And where, if anywhere, were you?

A. I was at Area 4 Youth, assigned to Crime Car 8414.

Q. Did you have occasion during that day to be at the 11th District police station?

A. Yes, I did. I was assisting Officer Conroy and Officer O'Driscoll in an arrest.

Q. And did you have occasion to conduct a lineup?

[42] A. Yes, I did.

Q. Now in gathering the people to put in this lineup did you assist in that?

A. Yes, I did. I conducted the lineup at the 11th District station for Officer Conroy and O'Driscoll.

* * *

Q. Now at the time of the lineup or lineups—well, first of all, was there one lineup conducted?

A. No, there was two lineups conducted.

Q. And who was present during the time of these lineups?

A. I believe the Johnson girl was one of the [43] parties present and the other party I'm not sure of the name. I just conducted the lineup.

Q. Were both of these parties present at the same time?

A. No, separately. I had an individual lineup for each one of the victims.

* * *

[44] Q. Did you have occasion to observe Mr. Ben Browder at that time?

A. Yes, I did.

Q. And what, if anything, was he wearing?

A. He had on a wool type of tam type hat and I noticed he had—his right hand was in a cast. I believe he stated he got shot and that is why he stated it was in a cast—

MR. MISSIRLIAN: Your Honor, I'm going to object.

THE COURT: Sustained.

* * *

[45] CROSS EXAMINATION

By MR. MISSIRLIAN:

Q. Officer Ahern, prior to conducting this lineup did you have an opportunity to talk to Johnnie Mae Johnson?

A. No, I didn't.

Q. And when this lineup was conducted there were actually two lineups conducted?

A. There was two lineups conducted. One for each of the victims.

Q. Which one of the girls viewed the lineup first?

A. I believe it was Johnson, I'm not sure. Like I said before, counsel, I just made the lineup procedures.

Q. Well, at any time was Sharon Alexander and Johnnie Mae Johnson in the same room when the lineup [46] was conducted?

A. No.

Q. So at no time could Miss Alexander have identified Mr. Browder and still have Johnnie Mae Johnson in the room?

A. No.

* * *

[47] MR. DRISCOLL: Judge, can I address myself to the motion to suppress statement?

THE COURT: Yes.

MR. DRISCOLL: First of all Allegation No. 5 that the statements were direct or indirect results of physical or mental coercion—

THE COURT: Paragraph 5.

MR. MISSIRLIAN: I would ask that physical coercion be stricken and specify mental coercion.

THE COURT: All right. So that the paragraph will read that any statement direct or indirect results [48] of mental coercion, is that correct?

MR. MISSIRLIAN: Yes.

* * *

(Testimony of Martin Conroy, direct examination on behalf of the prosecution by Mr. Salas.)

* * *

[49] Q. You are the same Martin Conroy that testified on the prior motion to suppress identification?

A. Yes, sir.

Q. Directing your attention to January 31st, 1971, did you have an occasion to effectuate the arrest of one Ben Browder?

A. Yes, I did.

Q. Where, if anywhere, did that arrest occur?

A. It occurred in the living room of his home.

Q. At the time that you arrested him did you inform him of what he was charged with?

[50] A. Yes, sir, I did.

Q. And did you say anything to him at that time?

A. Yes, sir, I informed him of his constitutional rights.

Q. What specifically did you say to him?

A. I said that he had the right to remain silent and the right to an attorney to be present before any questioning and if he couldn't or his parents couldn't afford an attorney one would be appointed free of charge to be present before

any questioning. That anything he said would be used in evidence against him in a court of law.

Q. And did you ask the defendant whether or not he understood these rights?

A. Yes, I did.

Q. And did he say anything to you?

A. He shrugged his shoulders and said he understood them.

Q. Did you then take the defendant into custody?

A. Yes, sir.

Q. Now where did you take him?

A. Took him directly to the 11th District on the second floor.

Q. And where on the second floor specifically [51] did you take him?

A. It's kind of a hallway outside the youth division office.

Q. Now approximately what time was that?

A. About six o'clock in the evening.

Q. Would that be approximately the same time the lineup was conducted?

A. About a half hour after that.

Q. Now at that time who was present, at the time that the defendant was in custody?

A. My three partners, Ahern, Toughy and O'Driscoll, his brother, Tyrone, and two other boys that we picked up in the Browder home.

Q. After the lineup did you have an occasion to have a conversation with the defendant?

A. Yes, I did.

Q. Who was present at that time?

A. After the identification Tyrone asked to speak to me and my partner and I went into the sergeant's office on the second floor.

Q. It was your partner and you and Mr. Browder, is that correct?

A. Yes, Ben Earl.

Q. And at that time did you make any statement [52] to the defendant?

A. Yes, sir, I did.

Q. What, if anything, did you say to him?

A. I said—first he told me that he would like to say that he did commit the rape on Johnnie Mae Johnson but he did not commit the rape on Sharon Alexander and I said—

I had to re-inform him of his rights because he made an admission of sorts.

Q. What specifically did he say?

A. He said that he did accost Johnnie Mae Johnson on the street, I don't recall the address but he took her to a gangway and there he had sexual intercourse with her. I asked him if he had any deviate sexual act and he said no. I said did you have a gun and he said no but he did admit to the rape.

Q. At the time that you admonished the defendant of his rights who was present?

THE COURT: Where? He said he did it twice.

MR. SALAS: Q. The first time who was present at the Browder home?

A. At the Browder home there was Ben Earl, his brother Tyrone, the two boys, I don't really recall their names but we arrested them and they stood in the lineup, his mother and a couple of other people in the house.

[53] Q. At the time that you so advised him at the 11th District who was present at that time?

A. My partner and myself and Ben Earl.

Q. What is the name of your partner, sir?

A. Frank O'Driscoll.

Q. Now during the period of the questioning, Officer, had Mr. Browder ever requested the presence of an attorney?

A. No, sir, he did not.

Q. Did he request that you terminate any questions, that you refrain from questioning him?

A. No, sir.

Q. Did he ask for an attorney?

A. No, sir.

Q. Did he ask to have any member of his family present?

A. No, sir.

MR. SALAS: Nothing further.

THE COURT: Cross.

CROSS EXAMINATION

By MR. MISSIRLIAN:

Q. While you were at the Browder residence, Officer Conroy, did you have a conversation with the defendant, Ben Browder?

[54] A. Yes, sir, I did.

Q. And at that time you informed him of his constitutional rights prior to the conversation?

A. There was some conversation just prior to informing him of his rights.

Q. Did you inform the other three individuals that were arrested of their rights?

A. Yes.

Q. And you arrested them all on the charge of rape?

A. Investigation of a rape.

Q. Investigation of a rape?

A. Yes, sir.

Q. And after you had advised Mr. Browder that he was under arrest for investigation of rape and you had informed him of his rights didn't he in fact deny any knowledge of these rapes?

A. Yes, sir, prior to the showup in the home he did deny it.

Q. And you were present at the time of the show up?

A. Yes, sir.

Q. And prior to the show up did you inform Mr. Browder that he had a right to an attorney to be [55] present at the show up?

A. Yes, sir.

MR. DRISCOLL: Objection.

THE COURT: Sustained.

* * *

MR. MISSIRLIAN: Q. Now the second time you informed Mr. Browder of his rights who was present?

A. Ben Earl Browder and my partner Frank O'Driscoll.

[56] Q. O'Driscoll?

A. Right.

Q. Were there any other police officers present?

A. None in that room itself.

Q. And this is when he made this alleged admission?

A. Yes, sir.

Q. This was after the identification by Miss Johnson?

A. This is after the show up was completed.

Q. Now when he made this alleged statement he denied having a gun?

A. Yes, sir, he did.

Q. Where were the other three men or four men in the the lineup?

A. One was returned to the lock up and the other three were released.

Q. Did Mr. Browder's brother ask to stay there?

A. No, sir.

Q. Well, when you were—

A. Not that I can recall.

Q. This interrogation of Mr. Browder, did you ask him if he wanted his brother present?

A. No, sir.

[57] Q. To your knowledge had his brother already left the station?

A. Yes, sir, I believe he did. I don't know.

Q. Now when you first informed Mr. Browder of his rights at his home he denied knowledge and involvement in these offenses, isn't that correct?

A. Yes, sir.

Q. And when he denied this knowledge and involvement in these offenses when you gave him these rights at his residence his mother and his brother and two friends were present?

A. Yes, sir.

Q. And he made admissions at the police station when no one but police officers were around?

A. Yes, sir.

Q. Were there any other admissions that day in your presence by Mr. Browder?

A. Yes, sir.

Q. Where and who was present?

A. Investigator Thomas from Area 4 Homicide. Ben Earl told me that he did commit the rape on Johnnie Mae, I told the homicide investigator and he took him into this other like ante room where he took a statement or an admission.

[58] Q. Where you present?

A. Yes, sir.

Q. And did you ask Mr. Browder to sign this statement?

A. I didn't speak at all. I was just present.

Q. Was there a court reporter present when this statement was taken?

A. No, sir.

Q. Did Mr. Thomas or Officer Thomas inform Mr. Browder of his rights?

A. Yes, sir, he did.

Q. And at the time this statement was taken did you ask Mr. Browder if he wanted to make a written statement?

A. I didn't ask him anything. I left it to the investigator.

Q. Did Investigator Thomas ask him if he wanted to make a written statement?

A. I don't recall, sir.

Q. Other than you and Investigator Thomas who else was in that room when this statement was being taken?

A. I don't know. There were a couple of other policemen. I don't know exactly which ones were there.

Q. Were any of the other policemen asking Mr. [59] Browder questions?

A. No, sir.

Q. Now when Mr. Browder made this alleged statement after the lineup how long had he been under arrest up to that time?

A. I think about an hour, an hour and a half. I don't know exactly.

Q. And this is after he had been identified by two girls, Sharon Alexander and Johnnie Mae Johnson?

A. Yes, sir.

Q. Were there any statements taken from Mr. Browder after January 31st, 1971?

A. I don't know. I didn't take any.

Q. Now Officer Conroy, when you were at the Browder residence on January 31st, 1971, after you made the arrest of Ben Browder did you search him?

A. Yes, sir, I believe we put a cursory search for weapons.

Q. Did you search the other three individuals there?

A. Yes, sir.

Q. Did you search the apartment?

A. No, sir.

Q. Did you ask to search the apartment?

[60] MR. DRISCOLL: Objection.

THE COURT: Sustained.

MR. MISSIRLIAN: Q. When you informed Mr. Browder of his rights at his home did you read this to him from a card?

A. No, sir.

Q. At the police station did you read it from a card?

A. No, sir.

Q. Did you ask him if he understood?

A. Yes, sir.

Q. How long did it take to conduct this interrogation of Mr. Browder at the police station?

A. I think from the time we walked in until the time he got to the lock up it might have been about two hours.

THE COURT: From the time you walked in when? Would you clarify that for me, counsel?

MR. MISSIRLIAN: Q. You mean the time you walked into the police station to the time you took Mr. Browder back to the lock up after this statement and after the show up?

A. Yes, sir.

THE COURT: The whole thing took—through the [61] lineup and everything took about two hours?

THE WITNESS: Yes, sir.

MR. MISSIRLIAN: Q. Well, how long did just the taking of these oral statements take?

A. The oral statement I took might have been about five or ten minutes and then Investigator Thomas I think had him another. I don't know, fifteen minutes or so, twenty minutes.

MR. MISSIRLIAN: That is all I have.

THE COURT: Redirect?

MR. SALAS: Yes.

REDIRECT EXAMINATION

By MR. SALAS:

Q. Officer Conroy, who was present at the time of the second statement?

A. The investigator from homicide, Thomas, myself and I don't know who exactly. We had three youth officers were working with me and he and a partner. I don't know exactly who else was there.

Q. Officer Thomas, you mean Investigator Thomas, his partner—

A. His partner might have been there. I don't know.

Q. Now after Mr. Browder made his first [62] statement to you did you ask him to make any further statements?

A. Yes, sir. I got a hold of the investigator and I told him he admitted that Johnnie Mae—

Q. Yes, but did you ask him to repeat his statement?

A. In front of the investigator?

Q. Yes.

A. Yes, sir.

Q. Did he agree to do so?

A. Yes, sir.

MR. SALAS: Nothing further.

THE COURT: Any recross?

MR. MISSIRLIAN: Just a couple of questions.

RECROSS EXAMINATION

By MR. MISSIRLIAN:

Q. When you took Mr. Browder down to the police station didn't his mother ask to go along?

A. I really don't recall. I don't think we had room.

Q. You don't recall or you don't know?

A. I don't recall.

Q. And when Mr. Browder was at the police station didn't his mother come down later on and ask [63] to see her son?

A. I don't recall.

Q. At the time of Mr. Browder's arrest do you know how old he was?

A. I know he was approximately 17 or 18. I didn't know his exact age.

MR. MISSIRLIAN: I don't have any more questions.

THE COURT: All right, you may step down.

(Witness excused.)

* * *

(Direct examination of John Toughy on behalf of the prosecution by Mr. Salas.)

* * *

[64] Q. And what is your occupation?

A. I'm a youth officer employed—my location of employment is 943 West Maxwell.

Q. Are you employed by the Chicago Police Department?

A. That is correct.

Q. Now directing your attention to January 31st, 1971, Investigator, were you working on that day?

A. Yes, I was.

Q. Directing your attention to the evening hours, the early evening hours, did you have occasion to be at the 11th District police station?

A. I did.

Q. And at that time were you present at the time of the lineup was conducted?

A. Yes, I was.

Q. Now after this lineup was conducted did you have occasion to see anyone who you now see in the court room today?

A. Yes.

Q. Would you point him out?

A. Mr. Ben Browder.

Q. Indicating the defendant, Ben Browder. After you saw the defendant did you see the defendant do [65] anything?

MR. MISSIRLIAN: When?

THE COURT: Well, pick a time a little bit more—

MR. SALAS: Q. At the time you saw the defendant, Ben Browder, approximately what time was that, Officer?

A. Well, we were at the home first, then we came to the station and that was approximately 6:30 I would guess offhand. I don't have the report with me.

Q. And who else was present at the time?

A. At the lineup there was present—

Q. Not at the lineup. After the lineup.

A. After the lineup there was his brother and two other boys that came from the house with us, I don't know what their names were, and three other officers and myself that were working on the case.

Q. What three other officers?

A. Officers O'Driscoll, Conroy and Ahern.

Q. After the lineup what, if anything, occurred?

A. After the lineup Mr. Browder asked Officer Conroy if he could speak to him away from the group of us, so Officer Conroy agreed to this but then he stated that Officer O'Driscoll would have to accompany him because of security at this time, he had been identified at this time so Officer O'Driscoll and Officer Conroy [66] went into another office which we call our JYD office which we use as the facilities in the 11th District.

Q. And did Mr. Browder and the officers go into that room?

A. Yes, they did.

Q. Did you go into the room at any time?

A. No, I wasn't in that room. I didn't enter that room.

Q. At the time that Mr. Browder was arrested did you make any statement to him?

A. At the time he was arrested?

Q. Yes.

A. At his home we advised him of the rights and then we accompanied him to the 11th District—

MR. MISSIRLIAN: Your Honor—

THE COURT: Objection sustained.

MR. SALAS: Q. Who made any statement to Mr. Browder at that time?

A. At the house I didn't make any statement. I don't remember offhand who was talking to Mr. Browder. I believe it was Officer Conroy but I'm not positive as to—somebody made the statement to him originally.

Q. What, if anything, was said to him?

A. He was advised of his rights at the house [67] and—

Q. Specifically, what was stated?

A. I don't remember the specific wording. It was to the effect we were investigating—it was a rape investigation and we wanted him to come with us. The effect was to go into the 11th District so we could clear up the investigation.

Q. Was he placed under arrest at that time?

A. Yes, he was.

Q. After he was placed under arrest what was said to him, if anything?

A. That we would go into the 11th District and this lineup would be conducted regarding this investigation.

Q. At the time he was arrested at the house who was present?

A. His mother, his brother, two other boys, I believe younger children but I don't remember offhand. There was quite a few people in the house.

Q. What, if anything, did Officer Conroy state to him?

A. Officer Conroy of course advised him that he was under arrest for the investigation—

Q. Specifically what did he state to him?

THE COURT: Did Conroy and Browder have a [68] conversation?

THE WITNESS: In the house?

THE COURT: Did they have a conversation in the house at that time?

THE WITNESS: As to the advising him of his arrest. I don't remember any other conversation.

THE COURT: Well, did Conroy say something to the defendant?

THE WITNESS: Yes.

THE COURT: What did he say?

THE WITNESS: What he stated was we were at the house and we had his name in connection with the rape investigation.

MR. SALAS: Q. And what did he state?

A. I don't remember offhand. I don't recall.

Q. Now after advising him he was under arrest regarding the investigation what specifically did Officer Conroy state to him after that?

MR. MISSIRLIAN: Your Honor, this has been asked and answered.

THE COURT: He may answer again.

THE WITNESS: I don't recall. What happened was I went into the kitchen and I was interviewing some other people—

[69] MR. MISSIRLIAN: Objection.

THE COURT: Sustained.

* * *

MR. SALAS: Q. Were you present during the whole period that the defendant was placed under arrest?

A. When we went into the house I was present at that time. I was in the house when the arrest was made.

Q. Now at the time you took Mr. Browder to the station did you make any statement to him?

A. To Mr. Browder?

Q. Yes.

A. No, I didn't.

Q. Did any officer make any statement to Mr. Browder while you were present?

MR. MISSIRLIAN: Your Honor, I'm going to object—

A. Officer—

THE COURT: Pardon?

MR. MISSIRLIAN: As to when?

[70] THE COURT: Well, time, yes. We have some time period involved. Sustained.

MR. SALAS: Q. Officer, did you have occasion to leave the presence of the defendant while you were at the house at any time?

A. Yes, I did.

MR. SALAS: Nothing further.

THE COURT: You may cross.

CROSS EXAMINATION

By MR. MISSIRLIAN:

Q. Officer Toughy, you were present when Officer Conroy informed the defendant, Mr. Browder, and the other individuals that—the other male individuals that were there that they were under arrest for investigation of a rape?

A. Yes, this was in the house, yes.

Q. And were you also present when Mr. Browder denied any knowledge or involvement of a rape?

A. I don't remember if there was a denial. There was a conversation but at the time—

Q. But did you—

A. Not offhand, no.

Q. Were you present when Mrs. Browder asked to go to the police station?

[71] A. Yes, I was.

Q. And was she informed that she couldn't go to the police station?

A. No, she wasn't.

Q. Were you present at the police station when Mr. Browder's brother called his mother after the lineup?

MR. SALAS: Objection.

THE COURT: Sustained.

. . .

MR. MISSIRLIAN: Q. Well, while you were at the police station, the 11th District, did you see Mrs. Browder?

A. No, I didn't.

Q. When you arrived at the police station with Ben Browder, Tyrone Browder and the other two individuals was Johnnie Mae Johnson and Sharon Alexander already there?

A. No, they weren't, not that I recall. I don't believe they were.

Q. You don't believe or you don't know?

A. No, they weren't there.

[72] MR. MISSIRLIAN: That is all.

REDIRECT EXAMINATION

By MR. SALAS:

Q. Officer, regarding this conversation with Mrs. Browder, did you ask her whether or not she wanted to accompany you to the station?

A. Yes, I asked her at the home.

Q. What, if anything, did she say?

A. She said no, I do not want to go with you.

. . .

(Direct examination of Francis O'Driscoll on behalf of the prosecution by Mr. Driscoll.)

. . .

[73] Q. What is your business or occupation?

A. I'm a youth officer currently assigned to Area 4 Youth.

Q. How long have you been so employed?

A. I have been a police officer for 15 and a half years and have been assigned to Area 4 Youth for two and a half years.

Q. Now were you so assigned and employed on January 31st, 1971?

A. Yes, I was.

Q. Were you working alone or with a partner?

A. I was working with Officer Conrad and also with Officer Toughy and Ahern.

Q. Conroy?

A. Conroy.

Q. Now calling your attention to January 31st, 1971, were you assigned to the investigation of any case?

A. Yes, we were assigned to a rape investigation.

Q. Where, if anywhere, did you go upon assignment to this investigation?

A. We went to the Browder home at 4053 West Monroe, I believe it is.

[74] Q. Did you have occasion to see anybody when you got to that location?

A. We were greeted at the door by I believe it was either Mr. or Mrs. Browder.

Q. Did you have occasion to see anyone else inside the house?

A. There was a number of people inside there, it seems to me about six or eight people, maybe more.

Q. Did you have an occasion to make any arrests at that location?

A. Yes, we did.

Q. Look around the court room today, Officer, and see if you see anyone in court that was arrested on January 31st.

A. The man seated at the table.

Q. What color clothing is he wearing?

A. He has levis and leather jacket and T shirt.

Q. Indicating for the record the defendant, Ben Browder. Who was present at the time the defendant was placed under arrest?

A. You mean as far as police officers were concerned?

Q. Yes, police officers.

A. There was Officer Ahern, Officer Toughy, [75] Officer Conroy and myself.

Q. Did any police officers say anything to the defendant at the time he was placed under arrest?

A. I believe Officer Conroy advised Mr. Browder of his rights.

Q. What specifically was said to him?

A. That he had a right—you mean what are the rights, state the rights?

Q. Yes. What specifically was said?

A. That he had a right to an attorney; that the State would provide an attorney if he didn't have the funds; he had a right to remain silent—I have it on my card.

Q. Do you recall specifically what was said to him, in substance?

A. In substance, yes.

Q. What, if anything, else was said after he was told he had a right to remain silent?

A. We asked him if he understood that and he said yes.

Q. And where were you at the time this was said?

A. I was in the doorway.

Q. Did you yourself advise the defendant of his rights or did someone else?

[76] A. Conroy advised him of his rights.

Q. Where was the defendant's mother at that time?

A. I believe she was—there was a room between the front room and the dining room—

Q. Was the defendant taken from the house?

A. He was requested to come with us and his mother stated that he would go with us and also three or four other boys were there.

Q. Now did Mrs. Browder accompany you to the police station?

A. No, Mrs. Browder did not accompany us to the police station.

Q. Did you ask her if she would like to go?

A. Yes, we did.

Q. And what, if anything, did she say?

A. She said no.

Q. Did you have an occasion to— strike that. Where, if anywhere, did you go after leaving the Browder home?

Q. Where did you go?

A. We went to the Fillmore station.

Q. Is that the 11th District?

[77] A. The 11th District station; right.

Q. Would you tell the Court what, if anything, you did relative to this case and your arrival at the station?

A. We made an arrest slip on Mr. Browder and then we had a conversation with Mr. Browder in the sergeant's office on the second floor.

Q. Who was present at that time?

A. Officer Conroy and myself, and Mr. Browder.

Q. What, if anything, did Officer Conroy say at that time?

A. He asked him—

Q. Without going into the statement did Officer Conroy say anything to him prior to the defendant making a statement?

A. I don't understand the question.

Q. Did Officer Conroy say anything to the defendant when he got into this room when you were present?

A. I believe he did. He asked him about the rape and Browder says yes—

Q. Without going into it, the defendant made a statement?

A. He made a statement, yes.

Q. Did you later see any other investigator [78] from a different unit other than your own?

A. Yes, Investigator Thomas and I believe it was Weininger.

Q. And were you present with Officer Thomas in the same room with the defendant?

A. Yes, I was.

Q. Who else was present, if anyone?

A. Officer Conroy.

Q. Was Officer Thomas present?

A. And Officer Thomas and Mr. Browder also.

Q. Did the defendant then make a statement?

A. Yes, he did.

Q. Now at any time did the defendant ever request an attorney being present?

A. No, he did not.

Q. Did he ever request to have his mother present?

MR. MISSIRLIAN: Judge, I'm going to object to the form of the question.

THE COURT: Rephrase your question, counsel. Sustained as to form.

MR. DRISCOLL: Q. At that time the second statement was made in the presence of Officer Thomas did the defendant mention his mother at any time?

[79] A. No, he did not.

Q. Did he ever mention an attorney?

A. No, he did not.

Q. Did he ever complain of being mistreated in any manner?

A. No, he did not.

MR. DRISCOLL: That is all I have. No further questions.

MR. MISSIRLIAN: I have no questions.

. . .

(Direct examination of Dan Thomas on behalf of the prosecution by Mr. Driscoll.)

. . .

Q. Are you a police officer for the City of Chicago?

[80] A. Correct.

Q. How long have you been so employed?

A. Nine years.

Q. Were you so assigned and employed to Area 4 on January 31st, 1971?

A. Yes, I was.

Q. Now calling your attention to the evening hours about 6:30 P.M., did you have occasion to receive an assignment of a rape case?

A. Yes.

Q. Where, if anywhere, did you go upon receipt of that assignment?

A. To the Cook County Hospital.

Q. And after going to the Cook County Hospital did you have occasion to go to any police station?

A. Subsequent follow-up investigation?

Q. Yes.

A. Yes.

Q. And was this on the 31st of January?

A. Yes.

Q. What, if any, station did you go to?

A. To the Fillmore, 11th District.

Q. Did you have occasion to speak to any police officers at that location?

[81] A. Yes, sir.

Q. And do you recall the names of the officers that you saw?

A. Officers Conroy, Driscoll, Ahern and I don't really recall the other, all of Area 4.

Q. Officer Toughy?

A. Officer Toughy.

Q. Did you have occasion to see anyone that was in custody at that time?

A. Yes.

Q. Look around the court room today, Detective Thomas, and see if you see anyone here in court who was in custody on January 31st, 1971, relative to this case.

A. Yes, I do.

Q. Point out whom, if anyone, you see.

A. Subject known as Ben Earl, the last name of Browder.

Q. Indicating for the record the defendant, Ben E. Browder. Did you have an occasion to have a conversation with Mr. Browder?

A. Yes, I did.

Q. Where did that conversation take place?

A. It took place at the 11th District, the second floor.

[82] Q. Who was present at the time it took place?

A. I was present, Officer Conroy, Driscoll and my partner at that time was Reininger, R-e-i-n-i-n-g-e-r.

Q. And was your partner present for the entire statement?

A. Yes, he was.

Q. Now what, if anything, did you say to the defendant when you first saw him?

A. I advised him of his constitutional rights.

Q. What did you say to him specifically?

A. First I told him that he had a right to remain silent and anything stated to me by him would be used subsequently in a court of law. That he had a right to an attorney. That attorney could be present in any questioning and that if he could not afford the services of an attorney one would be appointed by the State and would be present for that questioning.

Q. Now did the defendant later give you a statement?

A. Yes, he did.

Q. At any time while you were in his presence did he make any complaint to you of the way he was treated by the police?

A. No.

[83] Q. Was there anything said by the defendant to his mother while you were present?

A. None.

Q. Was there any mention of an attorney by the defendant in your presence?

A. No.

Q. How long were you in the presence of the defendant, Ben Earl Browder?

A. I would say two minutes.

Q. Did you have occasion then to leave the police station?

A. No, I was busy making out papers at that time. I just talked to him for that matter of time and then I completed my work.

MR. DRISCOLL: That is all. I have no further questions. Thank you.

THE COURT: Cross.

CROSS EXAMINATION

By MR. MISSIRLIAN:

Q. Officer Thomas, when you informed the defendant of his constitutional rights, the right to remain silent, the right to have an attorney present, did you read these off a card?

A. No, I didn't.

[84] Q. And after you had questioned or prior to questioning him and after you had given him these rights did you ask him if he understood?

A. Yes, I did.

Q. And Officer O'Driscoll and Conroy were present at this time?

A. Would you repeat that, please?

Q. When you gave the defendant his constitutional rights, Officer O'Driscoll and Officer Conroy were present?

A. That is correct.

Q. And after you advised him of these rights did you ask him to make a written statement?

A. No, I didn't.

Q. Were you present when the lineup was conducted?

A. No.

Q. And Mr. Browder was only in that room with you for approximately two minutes?

A. Yes.

Q. Did he leave that room or did you leave that room after you had your conversation with him?

A. I believe he left that room.

Q. And when you had this conversation with him do you remember if he was handcuffed?

A. No, he was not handcuffed.

[85] Q. Did he ask to make a phone call while he was in that room?

A. No.

Q. Do you know if he asked to make a phone call prior to that?

A. I don't think so.

Q. Do you know if he asked for an attorney prior to your conversation with him?

A. Prior to my conversation?

Q. Yes.

A. No, I don't.

Q. Do you know, did he ask for his mother prior to the conversation with him?

A. No, I don't.

Q. Do you know how old he was when you had this conversation with him?

A. 17 years old.

MR. MISSIRLIAN: I don't have any more. That is all.

MR. DRISCOLL: No further questions. Thank you.

THE COURT: Step down.

(Witness excused.)

MR. DRISCOLL: Your Honor, on behalf of the People the Respondent rests on this motion.

[86] MR. MISSIRLIAN: The Petitioner would rest.

THE COURT: Are we ready to argue both motions? Shall we do that tonight?

MR. MISSIRLIAN: Yes.

THE COURT: All right, let's go ahead. Argue first on the motion to suppress identification or whichever way you want to go.

MR. MISSIRLIAN: This is fresh in my mind—

THE COURT: Let's argue.

MR. MISSIRLIAN: If that is all right with the State.

MR. DRISCOLL: Fine.

MR. MISSIRLIAN: Your Honor, I will be as brief as possible again. The Court has only heard four witnesses here testify, they're all police officers, all admitted to being present during the time that the rights were given.

The second officer who testified, Ahern, that he was out of the room for a short amount of time and that he was not present during the interrogation at the police station. The first officer who testified, that was Officer Conroy, that he gave the rights to the defendant, Mr. Browder, at his home.

At this time I would like to point out [87] that Officer O'Driscoll was present when these rights were allegedly given to the defendant. At that time when the Court attempted to— I'm sorry, Officer Ahern and O'Driscoll were present, yet neither one of them, one could not remember if they were given to him and the second could not recite them without going to his card.

Secondly, at the police station, this was after the defendant had been identified, it was after the defendant knew he had been identified by two rape victims the police allegedly again told him of his rights to remain silent, yet a statement was again taken.

Officer O'Driscoll testified he was present at the time the second statement and the third statement were— the first and second statement at the police station, yet he could not remember if the rights were given. He never testified that the defendant was given his Miranda warnings at the police station or when Officer Thomas saw him.

Officer Thomas testified that he gave the defendant his rights but he does not know what happened prior to bringing

in the defendant into that room. He doesn't know whether the defendant had asked for an [88] attorney prior to that or had asked to see his mother or remained silent and was coerced in any manner.

The statement by Officer Thomas was taken after an alleged statement was made to Officer Conroy—

THE COURT: Counsel, I don't get your point but go ahead.

MR. MISSIRLIAN: The statement that allegedly was made to Officer Thomas was made after the defendant had been identified and after there had been a statement taken by Officer Conroy at which time Officer Driscoll was present and at that time Officer O'Driscoll says he does not remember—

THE COURT: I got that point. Go ahead.

MR. MISSIRLIAN: Certainly we have two police officers in this case, one doesn't remember the rights being given and the second who cannot recite the rights without going to his card. That alone I think puts a question mark as to whether the rights were in fact given or whether they were coerced, if at all—

THE COURT: What were coerced, the rights?

MR. MISSIRLIAN: If the statement was coerced, if it was given—

THE COURT: Go ahead, Mr. Salas.

MR. SALAS: Yes, Your Honor. The Court's memory [89] serves it best. It was not that officer, Officer Toughy by the way was on the stand did not say that— could not remember whether or not the rights were given. The Court full well heard him say that rights were given. However, he did not state specifically what in fact those rights were.

Part of the time he was not in the presence of the defendant Browder but was busy talking to his mother and talking to other people. The person who best remembers the rights that were given was the person who in fact did admonish the defendant of his rights and that was Officer Conroy. Officer Conroy in fact told the defendant of every right that he had out of those rights which Miranda versus Arizona requires the officer give.

He did comply, he did give him his rights and did ask the defendant whether or not he understood them and the defendant answered yes. You see again, Your Honor, that at the station the voluntariness of the statement is shown because the defendant as was testified to by Officer Conroy

and was testified to by Officer Toughy stated the defendant called Officer Conroy over and said I want to make a statement to you and they went into the room and it was at that point that the defendant made his [90] statement.

They asked the defendant to repeat his statement. Again I think the voluntariness that was shown because the defendant readily at that point repeated his statement to Investigator Thomas who again advised him of his rights even though the first admonition of rights, Your Honor, is all that is necessary.

I submit that the officers did comply with that. Officer O'Driscoll did not remember specifically what was stated, however, Your Honor, did in fact state the rights were given. This Court has no evidence to show to the effect that these rights were not given and I would submit that the State has met its burden, Your Honor, and that the defendant was fully advised of his rights in any statement he gave were a result of his own will.

THE COURT: Anything further on this? Are we ready then to proceed on the motion to suppress identification?

MR. MISSIRLIAN: Your Honor, on the motion to suppress identification the petitioner only presented one witness, that was Miss Johnnie Mae Johnson. She testified that when she viewed the lineup that she viewed it with Sharon Alexander. That Sharon Alexander [91] was present during the time of the lineup and that she was the first to make the identification.

She also testified that at the time the officer came to interrogate her when she made her complaint about this rape she gave a description. One of the facts in the description was that the man who allegedly attacked her was wearing an earring and had his hand—one of his hands or arm wrapped up in either a cast or bandage. At the time she viewed the lineup the only man in that lineup with a bandage and an earring in his ear was the defendant, Mr. Ben Browder.

Secondly, Miss Johnnie Mae Johnson testified that the rape occurred in a dark room, that when she was led into that room there was a preceding room with a light on but at that time the man who attacked her was behind her or holding her with a gun at her throat and an arm around her neck, that she did not view the man at that time.

The only time she says she got a good clear view of the

man who attacked her was in the darkened room while she was being attacked—

THE COURT: Counsel, let's go into the facts now, counsel. You argue your facts.

MR. MISSIRLIAN: Up to that time she had glimpses [92] of the man who attacked her. She again testified that when she left the room the man was at her side. They proceeded through the lightened room into a dark alley.

Now certainly the defendant here, Ben Browder, was in the lineup with a bandage on his hand and an earring. The opportunity for Miss Johnson to observe was not that great amount of time. She was frightened, as she testified. The only thing she clearly remembered was that the man had a bandage and an earring and when the defendant was in the lineup he was the only person with a bandage and an earring.

We would ask this Court to suppress the identification and including the lineup and the in court based on the suggestiveness of the police officers in conducting this lineup. They certainly elicited this identification.

They had the police reports before them. Some police officers had talked to Miss Johnson and they knew the man that attacked her had a bandage. Certainly we are not required to have five men or six men with bandaged hands and earrings in the lineup but I think the police are at least required to have Mr. Browder remove his bandage to make it a fair lineup because barring the bandage on the hand and the earring [93] I believe that Miss Johnson would not have been able to identify anyone in that lineup.

THE COURT: Mr. Driscoll.

. . .

[95] MR. DRISCOLL: The Court should therefore find that the facts are that the out of court identification and the lineup were proper and that the Court should deny this motion because petitioner-defendant has not met his burden of proof of showing that it was coerced in any manner.

THE COURT: Mr. Missirlian, anything further?

MR. MISSIRLIAN: No.

. . .

[97] (Proceedings of August 24, 1971)

THE COURT: There were two motions, two motions that were filed that the Court would be prepared to rule on now.

First was the motion to suppress statements and in that connection the evidence heard on this motion to suppress statement would support in the Court's mind only one conclusion and that is that the so-called [98] Miranda warnings or rights were given on two separate occasions, each time before statements were made, that with indications that the defendant understood these warnings as given.

The Court has heard no evidence whatsoever during the course of that hearing of any mental coercion or duress of any kind and accordingly defendant's motion to suppress statements is denied.

After reviewing carefully the evidence on the motion to suppress identification and reviewing the exhibit which was introduced during that motion this Court is not prepared to say that the lineup in the instant case and under the circumstances of this case was improper or unusually suggestive. But apart from the lineup I believe that the totality of the evidence including the sincere and positive and straight forward testimony of the victim clearly established that the victim here and under all the circumstances of this case and this occasion had ample opportunity to observe, to note and to remember her assailant, apart and unaffected by any subsequent lineup identification.

She had ample time and opportunity to observe her attacker when she first noticed him in the alley and he first came up behind her and in the darkened [99] room when her eyes became accustomed to the lighting conditions or to that particular room and the lighted room as they left and in the alley and on the street after leaving the basement.

She was able to describe her attacker quite accurately to the police after the attack and further and importantly her identification was not dependent solely on the normal visual observations but also involved a reliance on a voice of the defendant as well as certain uncommon characteristics such as a bandage or cast and the small gold earring.

Under all of these circumstances, under the totality of the evidence defense's motion to suppress identification is denied.

. . .

(Proceedings of August 26, 1971)

. . .

[113] THE COURT: Good morning, ladies and gentlemen. Be [114] seated, ladies and gentlemen. I think we are ready to proceed. Ladies and gentlemen, at this time the State's Attorney will make an opening statement, during which time he will tell you what he expects to prove and the defendant's attorney may respond.

. . .

(Prosecution's opening statement, Tr. 114-117, omitted)

[117] OPENING STATEMENT ON BEHALF OF THE DEFENDANT

By MR. MISSIRLIAN:

Ladies and gentlemen of the jury:

[117] In this case, there are two critical elements that the State must prove to you from the witness stand from the witnesses who will testify. One of which is the identification testimony of the young lady, Johnnie Mae Johnson. This identification testimony came after a lineup in which she will identify the defendant Ben Browder. Now, we will show to you that the lineup that was conducted by the police department was totally unfair and highly suggestive.

The second piece of evidence that the State will introduce is a statement, an alleged oral statement, made by the defendant Ben Browder to policemen. Now, this statement comes as the evidence will show after the defendant, in the company of civilians, protested his innocence. But the police department elicited an oral statement, not a written statement, after he is in police custody and when the only witnesses are police witnesses.

Now, when he is with his family, when he is with his friends, when he is with civilians, he protested his innocence. But the police come up with a statement after he is in custody.

I think after all the evidence is in, these [118] two factors will remain in your mind, whether it be the identification procedure was unfair and whether she could have identified anybody at that lineup other than Ben Browder; and, secondly, whether the alleged oral statement is truthful and in fact, did it ever occur.

Thank you.

THE COURT: All right. Will the State call its first witness, please?

MR. SALAS: Yes, your Honor. At this time, the State will call Miss Johnnie Mae Johnson to the stand.

(Testimony of Johnnie Mae Johnson, Tr. 119-150, omitted)

[150] THE COURT: The People may call its next witness.

MR. DRISCOLL: Detective Conroy.

[151] DIRECT EXAMINATION

By MR. DRISCOLL:

Q. State your full name, sir, and spell the last name for the Court Reporter, please?

A. Youth Officer Martin Conroy, Area 4 Youth, C-o-n-r-o-y.

Q. What is your business or occupation, sir?

A. Police officer with the Chicago Police Department.

Q. How long have you been employed as a police officer?

A. Just over five years.

Q. And how long have you been assigned to your present assignment?

A. Since May of '69.

Q. Calling your attention to January 31, 1971, were you so assigned and employed on that day?

A. Yes, sir, I was.

Q. Were you working alone or with a partner on that day, sir?

A. I was assigned with a partner.

[152] Q. Would you tell the ladies and gentlemen of the jury his name?

A. Frank O'Driscoll.

Q. Where is he today?

A. Today he is injured on duty or sick. He is not at work today.

Q. Now, calling your attention to January 31, 1971, did you have an occasion to receive an assignment?

A. Yes, sir, I did.

Q. What type of assignment did you receive?

A. Investigation of a rape.

Q. Tell the ladies and gentlemen of the jury and the Court where if anywhere you went in response to your assignment?

A. I went to the address of 4053 West Monroe.

Q. Do you know who lived there?

A. Yes, sir.

Q. Will you tell the ladies and gentlemen of the jury who lived there?

A. Ben Earl Browder.

Q. Will you look around the courtroom today, Officer Conroy, and see if you see anyone in court by that name?

[155] A. The fellow in the green shirt sitting next to the attorney. (Indicating.)

MR. DRISCOLL: Indicating for the record the defendant Ben Earl Browder.

Q. Did you go alone or with another officer?

A. I had the assistance of three other officers.

Q. Will you tell the ladies and gentlemen of the jury their names?

A. Youth Officer O'Driscoll, Youth Officer Touhey and Youth Officer Ahern.

Q. Were you working in uniform or in plainclothes?

A. Plainclothes.

Q. Tell the ladies and gentlemen what time you got to that location on Monroe Street?

A. I got there approximately six o'clock in the evening on the 31st.

Q. Did you have occasion to see Ben Earl Browder at that time?

A. Yes, I did.

Q. Was he placed under arrest at that location?

A. Yes, sir, he was.

Q. As to what charge was he placed under arrest?

A. Investigation of rape.

[154] Q. Will you tell the ladies and gentlemen of the jury where if anywhere he was taken?

A. We took him directly to the 11th District police station at 4001 West Fillmore.

Q. Now, the area of 4000 block on Monroe and 4100 block on Adam, is that in your Area 4?

A. Yes, sir, it is, in the 11th Fillmore District.

Q. The 11th District is included in Area 4?

A. Yes, sir.

Q. How far is the 4053 West Monroe address from the area of 4148 West Adam?

A. About one block across the alley.

Q. Now, where if anywhere was the defendant taken?

A. We took him to the 11th District.

Q. Where is the 11th District located, sir?

A. 4001 West Fillmore.

Q. What time approximately did you get to the 11th District?

A. I'll say about 6:15 that afternoon, about 15 minutes after the arrest.

Q. What if anything occurred after you got to the 11th District, sir?

A. We conducted a showup with four other gentlemen [155] giving his general description.

Q. How many people all told were in this lineup?

A. There were five in the lineup.

Q. Where and what part of this station did this lineup occur?

A. On the second floor.

Q. Now, what police officers were present during the time of this lineup?

A. The three that assisted me, Ahern, O'Driscoll and Touhey and myself.

Q. Did you have an occasion to see a young lady at the police station?

A. Yes, sir.

Q. Did you later ascertain her name?

A. Yes, sir, I did.

Q. Tell the ladies and gentlemen of the jury what name you ascertained?

A. She gave her name as Johnnie Mae Johnson.

Q. Did you ever see her in the presence of the defendant Ben Browder at the police station?

A. Yes, sir.

Q. And did she have an occasion to view this lineup?

A. Yes, she did.

Q. Did you say anything to her prior to viewing this [156] lineup?

A. Yes, sir. I told her we had a suspect in custody and I wanted her to view a group of five, who might possibly be in the lineup.

Q. Did you tell her who to pick out?

A. No, sir.

Q. Did you tell her that Ben Browder was going to be in the lineup?

A. No, sir, I did not.

Q. Can you describe in general the five people in the lineup, general height and the like?

A. Three of them were male Negroes, in their— about 17, 18, 19, about five-seven to five-nine and two of them were about five-eleven, maybe five-nine or six foot.

Q. Now, was this lineup photographed?

A. Yes, sir, it was.

Q. Officer Conroy, I will show you what has been previously marked as People's Exhibit 1 for identification purporting to be a photograph of five men in a lineup and ask you to examine that, please.

Can you identify that photograph?

A. Yes, sir.

[157] Q. Would you do so for the ladies and gentlemen of the jury, please?

A. This is the order in which the five suspects stood at the showup.

Q. Do you see anyone portrayed in that photograph who is present here in court today?

A. Yes, sir.

Q. Would you point out whom, if anyone, in the photograph is present in court today?

A. Ben Browder is standing here in the center of the showup.

Q. What if anything is he wearing in that photograph?

A. Wearing a white knit, looks like a stocking cap, and a corduroy coat.

MR. MISSIRLIAN: I object. If the officer wants to refresh his recollection—

THE COURT: I think the picture speaks for itself.

MR. DRISCOLL: All right, fine.

Q. Would you tell the ladies and gentlemen of the jury how the lineup took place and in what manner it was conducted?

A. One of my partners, Officer Ahern, conducted the lineup where he had each, starting with the one [158] on the left, give his name, his address and his place of employment and they went down the line one at a time with that. And he had them face front and he had them face to the side and they each repeated a phrase that the suspect offender was supposed to have uttered before the rape, "Don't look at me."

Q. Did each of these people do this in the presence of Johnnie Mae Johnson?

A. Yes, sir.

Q. Did she later make an identification?

A. She did.

Q. Did she have an occasion to leave after she made her identification?

A. Yes, sir.

Q. Did she leave the room in which the lineup was held?

A. Yes, sir, she did.

Q. Did you stay in that room after the lineup was conducted?

A. Yes.

Q. Will you tell the Court what if anything happened after the lineup?

A. After being identified by Miss Johnson, Ben [159] Browder called me off to the side and he said he wanted to tell me something.

Q. What specifically did he tell you?

A. He said that he did in fact rape Johnnie Mae Johnson.

Q. Where did this conversation take place?

A. It took place in one of the offices in the front of the second floor, building.

Q. Who was present, if you recall?

A. My partner, Frank O'Driscoll.

Q. Who else?

A. Ben Browder and myself.

Q. Approximately what time did this conversation take place, approximately?

A. After the showup, I think maybe about a quarter to seven, eight o'clock, I really don't know.

Q. Will you tell the ladies and gentlemen of the jury specifically what was said in that room by yourself and by the defendant, Ben Browder?

A. Ben Browder told me that he did rape Johnnie Mae Johnson. I said, "Now, wait a minute". I informed him of his constitutional rights.

Q. What specifically did you tell him?

[160] A. I told him that he had the right to remain silent and he had the right to an attorney to be present before he made any statement and if he could not afford an attorney, one would be provided free of charge to be present

before he made any statement and that anything he said would be used in evidence against him.

Q. Now, did you ever advise him of his rights prior to that time?

A. Yes, sir, I did.

Q. When did that take place?

A. At his home before we took him to the station.

Q. Who was present in general at that time?

A. His mother, his brother and two other fellows.

Q. Now, after you interrupted and advised the defendant of his rights, what if anything did he say?

A. And he said he did rape Johnnie Mae Johnson. And I asked him if he forced her in any deviate sexual act and he said no. I said, "Did you have a gun? She said you had a gun." And he said no, he did not.

Q. How long did this conversation last?

A. Couple minutes because right afterward, I informed the investigator that he had made an admission.

Q. What investigator did you inform?

[161] A. Investigator Thomas, Area 4 Homicide, and his partner.

Q. Now, did you have occasion to see the defendant again?

A. Yes, sir.

Q. Where did you see him again?

A. In another kind of like an anteroom up there. This is a small room off to the side.

Q. Who was present at that time, if anyone?

A. Frank O'Driscoll, myself, Investigator Thomas and his partner and a couple of other officers. I don't know if they were all in there.

Q. Now, did you have occasion to hear the defendant speak?

A. Yes, sir.

Q. What did he say?

A. He admitted having raped Johnnie Mae Johnson.

Q. Specifically what did he say, if you recall?

A. I don't recall exactly what he said.

Q. How long did this conversation last?

A. Couple of minutes.

Q. After that, where if anywhere was the defendant taken from that room?

[162] A. Right downstairs to the lockup where he was processed.

Q. Were any of his clothing, defendant's clothing, ever inventoried?

A. No, sir, not that I know of.

Q. Was there a gun ever recovered?

A. No, sir.

MR. DRISCOLL: May I have a moment, your Honor?

THE COURT: Surely.

(Brief pause in proceedings.)

MR. DRISCOLL: A few more questions, Officer Conroy.

Q. How much time elapsed between the first statement made by the defendant and the second statement made by the defendant?

A. Couple of minutes.

Q. Did everything that you testified to occur in the City of Chicago, County of Cook and State of Illinois?

A. Yes, sir.

THE COURT: You may cross, Mr. Missirlian. Mr. Missirlian, you may cross.

MR. MISSIRLIAN: That is all?

[163] MR. DRISCOLL: Yes, that's all.

CROSS EXAMINATION

By MR. MISSIRLIAN:

Q. Officer Conroy, you went to the Browder residence on the 31st of January, is that correct?

A. Yes, sir.

Q. At that time, you arrested the defendant Ben Browder?

A. Yes, sir.

Q. On the charge of investigation for rape?

A. Yes, sir.

Q. At that time, you informed him of his rights?

A. I did.

Q. At that time didn't he deny any knowledge of the rape?

A. Yes, sir, at that time he did.

Q. At that time, did you arrest anybody else?

A. Yes, sir.

Q. How many people did you arrest?

A. Three men.

Q. Do you know their names?

A. Tyrone Browder, his brother, and two other young fellows that were in the home.

[164] Q. These men were also in the lineup?

A. Yes, sir.

Q. After you arrested them, did you put handcuffs on them?

A. No, sir.

Q. Did you search him?

A. Yes, sir.

Q. At the time he was searched, did you recover a revolver?

A. No, sir.

Q. Did you recover a watch or any U.S. currency?

A. I don't recall, no, sir.

Q. What charge did you arrest the other three individuals on?

A. Investigation of rape.

Q. When they were taken down to the police station, were any of them handcuffed?

A. No, sir.

Q. Was there anybody else taken down to the station besides these four individuals?

A. No, sir.

Q. Did they voluntarily go with you to the police station?

[165] A. Yes, sir, they did.

Q. Who else was present with these four gentlemen in the apartment when you went in?

A. Mrs. Browder and couple of other kids in the house, I don't know, couple of young ladies and some children.

Q. And they were present when you advised Mr. Browder and his friends of their rights?

A. Yes, sir.

Q. And they were present also when Mr. Browder made a denial in his apartment?

A. Yes, sir.

Q. Now, when you took the statement in the police station, the first statement, your partner O'Driscoll was with you?

A. Yes, sir.

Q. Was there anybody else in the office at that time?

A. Well, we were still in the main hall when he called me and he said he wanted to make a statement and we went to

the front office where O'Driscoll accompanied me and Browder.

Q. Now, at that time was the defendant handcuffed?

[166] A. No, sir.

Q. Now, after he made this statement, did you ask him if he wanted to put it in writing?

A. No, sir, I did not.

Q. Did you call a court reporter or a stenographer to take this statement in writing?

A. No. I called the Homicide Investigator.

Q. Do you know if Mr. Browder was again searched at the police station?

A. No, sir, I don't know.

Q. When he was taken down to the lockup, do you know if he was searched at that time?

A. No, sir, I don't.

Q. Well, prior to placing him in this lineup, was he searched?

A. Yes, sir, when we left the house.

Q. This is the only time you searched him?

A. Yes, sir.

Q. Do you know if any other officer searched him?

A. No, sir, I don't.

Q. Up to this time, Officer, had you recovered any of the items that Miss Johnson said she lost in that alleged robbery and rape?

[167] A. I did not recover any, no, sir.

Q. Now, the clothes that Mr. Browder was wearing at the time of his arrest, was this taken from him and inventoried?

A. I don't know, sir. I didn't.

Q. Well, Officer, is this the first sex case you have ever handled?

A. No, sir.

Q. And isn't it customary—

MR. DRISCOLL: Objection to form.

THE COURT: I am going to sustain the objection.

MR. MISSIRLIAN: Q. Well, to your knowledge, was the underclothing taken?

A. I don't know.

Q. Then as you sit there, you don't know if anything was taken from Mr. Browder as to his clothes?

A. After my cursory search, I don't know if he was searched again.

Q. Was any of his clothing to your knowledge sent to the Crime Laboratory?

A. I don't know, sir.

MR. MISSIRLIAN: That's all.

[168] THE COURT: Any redirect?

MR. DRISCOLL: Yes.

REDIRECT EXAMINATION

By MR. DRISCOLL:

Q. Officer Conroy, when you arrested the defendant, you said you searched his person?

A. Yes, sir.

Q. What were you searching for?

A. Weapons.

Q. Did you have a search warrant to search his home?

A. No, sir.

Q. Was his home searched?

A. No, sir.

Q. After the lineup in which the defendant was identified, what if anything was done to the other three people that were arrested in the same investigation at the time of the defendant?

A. They were released.

Q. Included in that was the defendant's brother Tyrone?

A. Yes, sir.

Q. Besides the defendant and his brother, did any other members of his family go to the police station [169] with you?

A. No, sir.

Q. Did you advise the defendant of what he was being arrested for?

A. Yes, sir.

Q. Did you tell his mother? Did you speak to his mother at the home?

A. Yes, sir, I did.

Q. What if anything did you say to her in the home?

A. I told her that we had an investigation of an assault on a girl, that one of her sons was involved.

Q. And was she present at the time the defendant was placed under arrest?

A. Yes, she was.

Q. Was she present when the defendant was taken from the house?

A. Yes, sir.

Q. Did you tell her where the defendant was being taken?

A. Yes, sir, I did.

Q. Did she seek to accompany you?

A. No, not to my knowledge. I don't recall if she wanted to go or not.

[170] MR. DRISCOLL: That's all. Thank you.

THE COURT: Any recross?

MR. MISSIRLIAN: A few questions.

RECROSS EXAMINATION

By MR. MISSIRLIAN:

Q. Officer Conroy, when you were in the home, you searched the parties that you took down to the police station, did you not?

A. Yes, sir, I did.

Q. Did you ask Mrs. Browder if you could search her home?

A. No, sir, I did not.

Q. Do you know if any other officer asked if they could search the home?

A. I don't think they did.

Q. While you were advising the defendant or the people that were there that you took down to the police station of their rights, weren't there officers going through the home, walking to different parts?

A. Well, yes, sir, there were quite a few people in the building.

Q. Did any one of the four defendants or the Browder brothers tell you that you could search the home?

[171] A. No, sir.

Q. You never asked to search the home?

A. No, sir.

Q. When you went to the Browder residence, you knew Ben Browder would be there, am I correct?

A. Yes, sir. I called him at home before we left.

Q. You had talked to Mrs. Browder?

A. Yes, sir.

Q. You knew though the gentlemen would be waiting for you when you arrived?

A. Yes, sir.

MR. MISSIRLIAN: That's all.

MR. DRISCOLL: That is all. Thank you.

THE COURT: You may step down. Thank you very much.
(Witness excused.)

MR. DRISCOLL: The People would call Officer Ahern.

DIRECT EXAMINATION

By MR. DRISCOLL:

Q. State your full name, sir, and spell the last name?

A. Officer Chris Ahern, A-h-e-r-n, Chicago Police [172] Department.

Q. You are a police officer?

A. Yes, I am.

Q. Where are you presently assigned?

A. I am presently assigned to the 10th District.

Q. Where were you assigned in the month of January, 1971?

A. Area 4 Youth Division.

Q. Now, calling your attention to January 31st, 1971, how long were you a police officer at that time?

A. About eight and a half years.

Q. On that day, were you working alone or with a partner?

A. I was working with a partner.

Q. What is his name?

A. John Touhey.

Q. On that day, did you have an occasion to go anywhere with any other officers from your Area?

A. Yes, I did.

Q. Will you tell the ladies and gentlemen of the jury where, if anywhere, you went?

A. We were assigned to a crime car to work in the 12th and 13th Districts but we were called to assist [173] the crime car that works the 10th and 11th Districts.

Q. Did that include Officer Conroy and O'Driscoll?

A. Yes, it does.

Q. Did you have occasion to go to the 4000 block on West Madison—West Monroe?

A. Yes, 4053 West Monroe.

Q. Did you see any other police officers when you got there?

A. Yes, Officer Conroy and Officer O'Driscoll.

Q. Did you have occasion to enter the address at 4053 West Monroe?

A. Yes, I did.

Q. Do you know who lived there?

A. Yes, I do.

Q. Who lived there to your knowledge?

A. The Browder family lived there.

Q. Will you look around the courtroom today, Officer Ahern, and see if you see anyone here in court that you saw on January 31 at 4053 West Monroe?

A. Yes, I do.

Q. Point out anyone you see.

A. The young fellow in the green short sleeved shirt, Ben Browder. (Indicating.)

[174] Q. Where was he when you first saw him?

A. He was in the living room of his home.

Q. Was he placed under arrest?

A. Yes, he was.

Q. Was he taken anywhere?

A. Yes, he was taken into the 11th Police District.

Q. Do you know how he got to the 11th District from his home?

A. Yes, he was transported in either Officer O'Driscoll's car or Conroy's or our car. There were four fellows that were taken into the station. Officer Touhey and myself took two. Officer O'Driscoll and Conroy took the other two.

Q. Will you tell the Court and the ladies and gentlemen of the jury what if anything you did when you got back to the 11th District relative to this case?

A. At the 11th District, I conducted a showup of five individuals.

Q. Where did this showup or lineup take place?

A. The showup took place in the second floor at the 11th District.

Q. Were any officers other than yourself present [175] at that time?

A. Yes, there were, Officer Conroy, Officer O'Driscoll and Officer Touhey.

Q. How was this lineup conducted, Officer Ahern, in what manner or in what method did you conduct it?

A. There were five people, individuals, approximately the same height, weight and age. They were lined up facing a wall. We had the victim of the crime come in, sit down, and had all the individuals turn together. Each individual, one at a time, starting from left to right took one pace forward, gave his name, his address and the words used in the commission of the crime.

Q. What words were used?

A. "Don't look at me."

Q. Did all the people in the lineup do this?

A. Yes, they did.

Q. Was this lineup photographed?

A. Yes, it was by the Evidence Technician of the Chicago Police Department.

Q. I show you what has been marked as People's Exhibit 1 for identification purporting to be a photograph of five men in a lineup and ask you to examine that, [176] please.

Can you identify that photograph?

A. Yes, I can. That's the photograph of the lineup taken at the 11th District that day.

Q. Look around the courtroom today, sir, and see if there is anyone here in court whose picture is portrayed in that lineup?

A. Yes, Ben Browder, the center individual in the photo.

Q. Is this a true and correct portrayal of the lineup as it appeared on January 31, 1971?

A. Yes, it is.

Q. Did a Johnnie Mae Johnson view this lineup?

A. Yes, she did.

Q. Did she make an identification?

A. Yes, she did.

Q. Did she leave after the identification was made?

A. Yes, she did. She went into an outer office at the 11th District.

Q. Were you present when any statements were made by the defendant?

A. No, I wasn't.

Q. Did you have an occasion to see the Homicide-Sex [177] Investigator from Area 4 at the station?

A. No, I didn't. I conducted the lineup and we had to go over to a—

MR. MISSIRLIAN: Objection.

THE COURT: Read the answer, Mr. Reporter.

(The answer was read by the Reporter.)

That answer is yes or no.

THE WITNESS: A. No.

MR. DRISCOLL: Q. Where if anywhere did you go after the lineup was conducted?

A. Officer Touhey and myself went to the 13th District on another case.

Q. Did everything you testified to occur in the City of Chicago, County of Cook and State of Illinois?

A. Yes, it did.

MR. DRISCOLL: Thank you. No further questions.

THE COURT: You may cross examine.

MR. MISSIRLIAN: All right, thank you.

CROSS EXAMINATION

By MR. MISSIRLIAN:

Q. Officer Ahern, you conducted the lineup?

A. Yes, I did.

Q. Do you remember approximately what time this [178] lineup was conducted?

A. Approximately 6:30.

Q. And at the time of the lineup, while Mr. Browder was in that lineup, wasn't he instructed to put on a white tam?

A. No, he wasn't.

Q. Was he wearing a white tam?

A. Yes, he was.

Q. And he voluntarily put on that white tam?

A. He was wearing the hat as the other individuals in the lineup all were.

Q. All of them?

A. No, not all of them. I believe there were three or four fellows wearing hats and he was wearing his.

Q. Were they all wearing white tams?

A. No.

Q. But Mr. Browder was the only person wearing a white tam?

A. I am not sure.

Q. How about an earring, did anybody else in that lineup have an earring on at the time?

A. Not that I know of.

[179] Q. You also conducted a voice identification, isn't that correct?

A. Yes, by having the individuals repeat the words in the commission.

Q. Did you take a photograph of the lineup or did someone else?

A. The Evidence Technician from the police department took the photograph.

Q. And was that after the identification was made or prior to that time?

A. It was after the identification.

Q. And after the identification was made, were all the individuals taken out of the room that were in the lineup?

A. Yes, they were taken to a side office.

Q. Now, you were at the Browder residence when Ben Browder and three other individuals were arrested for investigation of rape?

A. Yes, I was.

Q. You were there when Ben Browder was allegedly informed of his rights by Officer—by another officer there?

A. I did not hear the rights being given to them [180] but I was told that they were.

Q. Were you in the living room at that time?

A. I believe I was in the hallway leading to the living room.

Q. Did you ever ask to search that apartment?

A. No.

Q. Do you know if any other police officers ever asked if they could search the apartment?

A. No, I don't.

Q. And when Mr. Browder and the other young boys were taken to the police station, were they handcuffed?

A. No, they were not.

Q. Did they voluntarily go with you to the police station?

A. Yes, they did.

Q. At the time Mr. Browder was in his home and the arrest was being made and the search of his person, did you hear Mr. Browder deny any knowledge of the rape and robbery?

A. No, I did not.

Q. How was Mr. Browder dressed when you arrived at the apartment, if you remember?

A. I don't recall. I think he was in a shirt and [181] trousers is all.

MR. MISSIRLIAN: That's all.

THE COURT: Any redirect?

MR. DRISCOLL: No. Thank you.

THE COURT: You may step down. Thank you very much.

(Witness excused.)

MR. DRISCOLL: Judge, we can continue or do you want to break for lunch?

THE COURT: Go ahead.

MR. DRISCOLL: All right. We will call Officer Touhey.* * *

DIRECT EXAMINATION

By MR. DRISCOLL:

Q. State your full name, sir, and spell your last name?

A. John Touhey, T-o-u-h-e-y.

Q. What is your business or occupation, sir?

A. I am a Chicago Police Officer assigned to Area 4 Youth Division.

[182] Q. How long have you been employed as a police officer?

A. Seven years.

Q. How long have you been assigned to Area 4?

A. Three years.

Q. Were you so assigned and employed on January 31st, 1971?

A. Yes.

Q. Calling your attention to that day, were you working in uniform or in plainclothes?

A. I was working in plainclothes.

Q. Does the area of your Area known as Area 4, does that cover the vicinity of 4100 West Adam and 4000 West Monroe?

A. Yes, it does.

Q. Were you working alone or with a partner on January 31?

A. I was working with a partner.

Q. What is his name?

A. Christopher Ahern.

Q. Did you have occasion to go anywhere on that day with him?

A. Yes, I did.

[183] Q. Where if anywhere did you go?

A. We went to 4053 West Monroe.

Q. What type of assignment did you go there for?

A. We were an assist with another team to go there on a rape investigation.

Q. What police officers did you observe when you got to that location?

A. Officer O'Driscoll and Officer Conroy.

Q. Did you have occasion to enter 4053 West Monroe Street?

A. Yes, I did.

Q. Did you ascertain who lived at that location?

A. Yes, I did.

Q. And do you know who lived there, the name of the party?

A. Yes, the Browder family.

Q. Will you look around the courtroom today, Officer Touhey, and see if you see anyone here in court that you saw at the Browder home on January 31?

A. The gentleman in the green shirt was in the home. (Indicating.)

MR. DRISCOLL: Indicating for the record the defendant Ben Browder.

[184] Q. Was he placed under arrest?

A. Yes, he was.

Q. Were there other people placed under arrest with him?

A. Yes, there were.

Q. Where if anywhere were these people taken?

A. They were taken to the 11th Police District.

Q. Will you tell the Court what if anything you observed and the ladies and gentlemen of the jury at the 11th District?

A. I observed a lineup procedure at the 11th District.

Q. Who conducted the lineup?

A. Officer Ahern conducted that lineup.

Q. Were there any other officers present?

A. Yes, Officers Conroy and O'Driscoll were also present.

Q. How many people were in that lineup?

A. Five people.

Q. Were any of the people that were arrested at the Monroe Street at this lineup?

A. Yes.

Q. How many?

A. Four people from Monroe Street were in that lineup.

[185] Q. Did Johnnie Mae Johnson view that lineup?

A. Yes, she did.

Q. Did she make an identification?

A. Yes, she did.

Q. Will you tell the Court and the ladies and gentlemen of the jury what if anything you observed her doing after the identification was made?

A. She left the squadroom.

Q. Were you in the room after she left?

A. Yes, I was.

Q. Was anyone else, any of the people in the lineup still in the room?

A. Yes, they were all in the room immediately after the lineup.

Q. Tell the ladies and gentlemen of the jury what if anything you observed after Johnnie Mae Johnson left the room?

A. Well, after Johnnie Mae Johnson left the room, we brought the people, the five individuals back over to the outer office and as we approached the outer office, the defendant in the green shirt, Mr. Browder, approached Officer Conroy who was standing next to him and asked him whether he could talk to him.

[186] Q. What if anything happened at that time?

A. Well, Officer Conroy and the defendant went into an adjoining office with Officer Driscoll, his partner, went in the office with them.

Q. Did you go into that office?

A. No, I didn't.

Q. Were you present during any statement that the defendant may have made at the station?

A. No, I wasn't.

Q. Where if anywhere or what if anything did you do after you saw the defendant go into that office with the two officers that you have named?

A. Well, I went back—I was talking to the other individuals that were involved in the lineup, the other three individuals, other four individuals.

Q. Were the other people arrested with Ben Browder released after his lineup?

A. Yes, they were released after the processing procedure.

Q. Now, sir, I will show you what has been marked as People's Exhibit 1 for identification purporting to be a photograph of five men in a lineup and ask you to examine that please.

[187] Can you identify that photograph, Officer?

A. Yes, I can.

Q. Would you do so for the ladies and gentlemen of the jury?

A. This is the lineup of the five gentlemen. The picture was taken at the Police District, the 11th District.

Q. Is this a true and correct portrayal of the lineup as you observed it on January 31, 1971, at the 11th District?

A. Yes.

Q. Do you see anyone in court whose picture is in the lineup photograph?

A. Yes, the defendant, Mr. Browder.

Q. Is that a true and correct portrayal of the defendant as you saw him on that day?

A. Yes, it is.

Q. Thank you. Officer Touhey, did all the testimony that you gave in court today, did everything occur in the City of Chicago, County of Cook and State of Illinois?

A. Yes, it did.

MR. DRISCOLL: Thank you very much. No further questions.

[188] THE COURT: You may cross examine.

CROSS EXAMINATION

By MR. MISSIRLIAN:

Q. Officer Touhey, when you went to the Browder residence, did you go into any of the—did you go into the apartment?

A. Yes, I did.

Q. How many rooms of that apartment did you go into?

A. I was in the living room and I was in the kitchen which is the back room.

Q. Did you ask anyone at that time if you could search the apartment?

A. No, I didn't.

Q. Now, were you present when Mr. Browder and the

other gentlemen at the apartment were informed of their rights?

A. Yes, I was.

Q. You were?

A. Yes, sir.

Q. Who informed them of their rights?

A. Officer Conroy.

Q. And at that time, did you hear the defendant say that he had no knowledge of a rape and that he [189] would accompany the police to the station?

A. No. He had no knowledge. I believe he said he had no knowledge of the rape but he said he would not accompany us.

Q. He said he would not?

A. That's correct.

Q. Well, was he handcuffed and led out of that apartment?

A. No, he wasn't. He was led out of the apartment. He was not handcuffed.

Q. How about the other boys, were they handcuffed and led out?

A. No, they were not.

Q. None of them went voluntarily to the police station?

MR. DRISCOLL: Objection. That is a conclusion.

THE COURT: Sustained.

MR. MISSIRLIAN: Q. Now, you testified that you were present when after the lineup, the defendant approached Officer Conroy and asked if he could talk to him?

A. That is correct.

Q. And who else was present when the defendant [190] allegedly approached Officer Conroy?

A. As I recall, Officer Conroy and I were standing together. We were the only ones in that immediate area.

Q. Was Officer O'Driscoll there?

A. He was present in the squad room but I don't know what relationship he was to us. I don't know how close he was.

Q. You didn't go with Officer Conroy into the room where this statement was allegedly had?

A. No, I didn't.

Q. You said the other people in the lineup were released?

A. That's correct.

Q. All three of them or all four of them, the three other individuals in the lineup were released?

A. There were three released.

Q. Three released. And they were processed first, is that correct?

A. That is correct, before we released them.

Q. When you say processed, what do you mean?

A. Well, there are arrest slips made out and then they are processed through the identification section [191] to make sure that they are not wanted for something and then they are released by the signature of the Commanding Officer of that district.

Q. Were they fingerprinted and photographs taken at that time?

A. Whatever the processing procedure is. I am not that familiar with fingerprinting and that end of it.

Q. Now, when you entered that apartment, Browder residence, on the 31st, do you remember how Ben Browder was dressed?

A. At the time, I don't recall what he was wearing in the apartment. I don't recall.

Q. Well, do you remember if anybody in that lineup other than Mr. Browder was wearing an earring?

A. I don't recall.

Q. How about a white tam, was there anybody in that lineup besides Mr. Browder wearing a white tam?

A. There was—you mean in the apartment or at the station?

Q. At the station?

A. In the station, no, there was nobody else in a white tam that I remember.

Q. While the lineup was being conducted, was Mr. [192] Browder instructed to put on that white tam, if you remember?

A. I don't really recall that.

Q. Now, when you entered the Browder residence on the 31st, you or any other police officer with you have an arrest warrant?

A. No, we didn't.

Q. Did you or any other police officer at that time have a search warrant?

A. No, we didn't.

Q. Did you search the defendant Mr. Browder or did some other officer?

A. I did not search the defendant.

Q. Did you search anybody in that apartment?

A. No, I didn't search anybody.

Q. Did you enter any other room besides the living room and kitchen?

A. No, they were the only two rooms that I was in.

Q. Do you remember if any other police officers entered other rooms?

A. No, not that I recall.

MR. MISSIRLIAN: That's all.

THE COURT: Any redirect?

[195] REDIRECT EXAMINATION

By MR. DRISCOLL:

Q. Officer Touhey, were the people in the lineup given clothing at the station to put on at that lineup or did they wear the clothes they had on in the lineup?

A. They brought the clothes in. I believe they brought—they were wearing the same clothes they were wearing at the police station and they put on coats and hats. There was no clothing distributed at the lineup.

Q. Ben Browder, he was wearing the clothing he had on at the apartment in the lineup, is that correct?

A. That's correct.

MR. DRISCOLL: May I have a moment?

THE COURT: Yes, you may.

(Brief pause in proceedings.)

MR. DRISCOLL: Q. One last question, Officer Touhey. Were any other people in the lineup other than this defendant, Mr. Browder, wearing a hat if you recall?

A. I don't believe so. I think Mr. Browder was the only one wearing a hat.

MR. DRISCOLL: Thank you. That is all.

THE COURT: Any additional cross, Mr. Missirlian?

[194] RECROSS EXAMINATION

By MR. MISSIRLIAN:

Q. Just one question, Officer. Officer Touhey, while you

were in the apartment, did you hear any police officer instruct Mr. Browder or any of the other individuals to take certain articles of clothing?

A. No, I don't recall any.

MR. MISSIRLIAN: That is all.

MR. DRISCOLL: Nothing further.

* * *

[196] MR. SALAS: Yes, At this time the People will call to the stand Investigator Stan Thomas.

DIRECT EXAMINATION

By MR. SALAS:

Q. Will you state your full name and spell the last name, sir?

A. Investigator Stan Thomas, T-h-o-m-a-s, Star No. 9737 assigned to Area 4 Homicide.

Q. Who do you work for, Investigator?

A. Chicago Police Department.

Q. How long have you been employed with the City of Chicago Police Department?

A. Nine years.

Q. Were you so employed on January 31, 1971?

A. Yes.

Q. Directing your attention to that day, Officer, that is January 31, 1971, did you have an occasion to have an assignment?

A. Yes.

Q. How was that assignment communicated to you?

[197] A. I was assigned by the Area Watch Commander to proceed to the Cook County Hospital in reference to a rape investigation.

Q. After you proceeded to the Cook County Hospital, did you have occasion to have a conversation with anyone?

A. I would like to clarify the last statement I made. I had been sent to the 11th District with reference to a subject in custody for rape.

Q. Thank you. Proceeding to the 11th District, did you have occasion to meet any officers there?

A. Yes.

Q. Where is the 11th District police station located?

A. At Fillmore and Pulaski.

Q. What officers did you meet when you arrived there?

A. Youth Officer Conroy, O'Driscoll and two others. I think one is Ahern and Touhey, I believe.

Q. Did you have occasion to have a conversation with them at this time?

A. Yes.

Q. After your conversation with those officers, what did you do then?

A. I spoke to the defendant.

[198] Q. The person who you spoke to present in this courtroom today?

A. Yes, he is.

Q. Would you indicate to the ladies and gentlemen of the jury which person he is?

A. The person sitting to the right of counsel there. (Indicating.)

MR. SALAS: Indicating for the record the defendant, Ben E. Browder.

Q. Did you at that time have an occasion to have a conversation with Mr. Browder?

A. Yes.

Q. Prior to that, who was present at that conversation?

A. Youth Officers Conroy and O'Driscoll.

Q. Approximately what time was that, Officer?

A. Approximately 6:30 in the evening.

Q. Where in the 11th District did this conversation take place?

A. On the second floor of that station.

Q. Prior to propounding any questions to the defendant, did you have occasion to make certain statements to him?

A. I informed the defendant of his constitutional [199] rights.

Q. Specifically tell the ladies and gentlemen of the jury what you told the defendant?

A. One, I told him that he had the right to remain silent, that anything he stated to me can be used later in a court of law. Two, that he has a right to an attorney to be present at all questioning, attorney of his own choosing and if he did not have the funds to afford an attorney, an attorney then would be appointed to him by the State and could be there present for any questioning.

Q. After you informed him, made a statement to the

defendant, did the defendant make any statements to you, Officer?

A. Yes, sir.

Q. What if anything did the defendant, Ben Browder, state to you?

A. He made an oral admission to the rape.

Q. What did he state specifically?

A. That he had raped Johnnie Mae Johnson.

Q. After the defendant admitted he raped Johnnie Mae Johnson, what if anything did you do after that?

[200] A. I then prepared the proper papers charging him with the rape and armed robbery.

Q. And did you make any further investigation into this case at that time?

A. No.

Q. Officer, directing your attention back to the time that you had this conversation with the defendant, Ben Earl Browder, would you tell the ladies and gentlemen of the jury, give what he was wearing at that time?

A. The subject had on a white tam. He had a cast on his right wrist and an earring on his left ear and he had dark jacket on and dark clothing he had on in general.

Q. Then finally, Officer, did everything you testified to, did all of this occur in the County of Cook and State of Illinois?

A. Yes.

MR. SALAS: No further questions? You may inquire.

THE COURT: Mr. Missirlian.

CROSS EXAMINATION

By MR. MISSIRLIAN:

Q. Officer Thomas, when Mr. Browder made this alleged [201] oral admission to you, what police officers were present?

A. My partner was present, Investigator Reininger, Youth Officer Conroy and Youth Officer O'Driscoll.

Q. Did you ask Mr. Browder if he wanted to make a written statement?

A. No, sir.

Q. When this statement was taken, was there a court reporter or a stenographer in the room?

A. No, sir.

Q. Other than police officers, was there anybody else in the room?

A. I don't recall.

Q. How long of a period of time did you see Mr. Browder?

A. Two to three minutes.

Q. Now, prior to coming to court today, had you seen photographs of the lineup?

A. Yes.

Q. And prior to coming here today, have you talked with the other officers on this matter?

A. Yes, sir.

MR. MISSIRLIAN: That's all.

. . .

(Proceedings of August 27, 1971)

[206] MR. SALAS: Yes, your Honor. At this time, your Honor, the People will call to the stand Doctor Farooq Nazir.

(Testimony of Dr. Nazir, Tr. 206-214, omitted)

. . .

[216] MR. DRISCOLL: Your Honor, the People will call Officer Frank O'Driscoll.

DIRECT EXAMINATION

By MR. DRISCOLL:

[217] Q. Will you state your full name and spell the last name?

A. Yes, Officer Francis O'Driscoll, O-apostrophe-D-r-i-s-c-o-l-l-

Q. What is your business or occupation, sir?

A. Youth Officer assigned to Area 4 Youth.

Q. How long have you been a police officer for the City of Chicago?

A. 15 and a half years.

Q. How long have you been assigned to Area 4 Youth?

A. Two and a half years.

Q. Were you so assigned and employed on January 31, 1971?

A. Yes, I was.

Q. Calling your attention to that date, Officer, were you working alone or with a partner?

A. I was working with a partner.

Q. What is his name?

[218] A. Martin Conroy.

Q. Now, again directing your attention to the same date, did you have an occasion to receive an assignment?

A. Yes, we did.

Q. Did you have an occasion to go anywhere upon receipt of that assignment?

A. Yes, we did.

Q. Where if anywhere did you go?

A. 4053 West Monroe Street, first floor apartment, I believe it was.

Q. What type of assignment did you receive?

A. It was a rape investigation.

Q. Now, did you have an occasion to see anybody when you got to 4053 West Monroe Street?

A. Yes, I did.

Q. Look around the courtroom today, Officer, and see if you see anyone here in court who was present at 4053 West Monroe on January 31, 1971?

A. The gentleman at the table with the green shirt on.

MR. DRISCOLL: Indicating for the record, the defendant, Ben E. Browder.

[219] Q. Now, was Mr. Browder placed under arrest?

A. Yes.

Q. Where if anywhere was he taken after being placed under arrest?

A. To the 11th District, Fillmore Station, Fillmore and Pulaski.

Q. Did you have occasion to see him at that location?

A. Pardon me?

Q. Did you have occasion to see Mr. Browder at the 11th District?

A. Yes. I brought him in.

Q. Tell the Court and the ladies and gentlemen of the jury where you saw him at the 11th District?

A. On the second floor in the Youth Office, in the Sergeant's office.

Q. Was there a lineup held at the 11th District?

A. Yes, there was.

Q. Were you present during that lineup?

A. Yes, I was.

Q. Did you have occasion to see a young lady named Johnnie Mae Johnson?

A. Yes, I did.

Q. Did you see her in the presence of the defendant, [220] Ben E. Browder?

A. Yes, I did.

Q. This was at the time of the lineup?

A. Yes.

Q. What that lineup photographed?

A. I believe it was.

Q. Officer, I will show you what has been marked as People's Exhibit No. 1 for identification purporting to be a photograph of five men in a lineup and ask you to examine that, please.

After examining it, can you identify that?

A. Yes, that's a photograph that was taken that night.

Q. Is that a true and correct portrayal of the lineup as you observed it on January 31?

A. To the best of my knowledge, yes.

Q. Did Miss Johnson make an identification?

A. Yes, she did.

Q. Did she leave after viewing the lineup?

A. I believe she left shortly thereafter. I am not sure.

Q. Did you have an occasion to see Ben Browder after the lineup?

[221] A. Yes.

Q. Where did you see him after the lineup?

A. I seen him in the Sergeant's office. I seen him shortly thereafter back in the Youth Office again.

Q. Now, will you tell the ladies and gentlemen of the jury who was present, if anyone, when you saw the defendant in the Sergeant's office?

A. My partner, Officer Conroy.

Q. Was there a conversation at that time?

A. Yes. Officer Conroy, Mr. Browder and myself had a conversation.

Q. What if anything did the defendant say at that time?

A. He called us over and stated he wanted to tell us about the incident that took place and at that time Officer Conroy again gave him his rights and he stated he understood these and he said that he did not have a gun and he did not commit an act of oral copulation with the girl. He did have intercourse with her.

Q. Now, did you later see the defendant in another room?

A. Approximately 15 feet from there in the Youth [222] Office.

Q. Who was present at that time, if anyone?

A. Conroy, myself and I believe one of the other officers. I am not sure.

Q. Was Investigator Thomas present?

A. Thomas was there of the Homicide Unit.

Q. Did the defendant say anything at that time in the other room?

A. He stated again to Conroy and Thomas and myself what he had related over at the Sergeant's office.

Q. What was that that he said the second time?

A. That, well, he stated that he had had intercourse but he did not have oral copulation and he did not have a gun.

Q. After that, was the defendant charged and processed?

A. He was processed, yes, by Officer Thomas and his partner.

Q. Now, did the defendant use the word intercourse when he was telling you what happened?

MR. MISSIRLIAN: Your Honor, I am going to object.

THE COURT: I am going to sustain the objection. He has already testified as to the statement.

[223] MR. DRISCOLL: Did everything you testified to occur in the County of Cook and the State of Illinois?

A. Yes.

THE COURT: You may cross examine, Mr. Missirlian.

MR. MISSIRLIAN: Are you through?

MR. DRISCOLL: I'm sorry, I'm all done. Thank you.

CROSS EXAMINATION

By MR. MISSIRLIAN:

Q. Officer O'Driscoll, you were present when the defendant Mr. Browder was arrested, is that correct?

A. Yes, I was.

Q. When he was arrested were any other individuals arrested?

A. I believe there were four more.

Q. What were they charged with?

A. They were brought in for investigation and released.

Q. They were brought in for investigation, is that correct?

A. Right.

Q. And Mr. Browder was brought in for investigation?

A. Right.

Q. And at that time, were you present when Mr. [224] Browder denied any knowledge of a rape in his apartment?

MR. SALAS: Objection.

THE COURT: Well, I will sustain the objection to that particular form unless you are laying a foundation.

MR. MISSIRLIAN: Q. When you were in the apartment, did your partner, Officer Conroy, question Mr. Browder?

A. Yes, he did.

Q. Did he question the other individuals in the apartment?

A. Yes, he did.

Q. When he questioned Mr. Browder, did he inform him that he was under arrest for investigation of rape?

A. Yes.

Q. And at that time, did Mr. Browder deny any knowledge of a rape?

A. I am not sure but I think he did.

Q. Do you remember who was present in the apartment when this conversation took place?

A. The other four people, Mrs. Browder, I believe, the father or a male anyway, approximately six to eight people.

Q. Now, when this alleged statement was taken at that [225] police station, were there any other civilian witnesses to witness the statement?

A. Not to my knowledge. When the first statement was given, it was given in the presence of Conroy, myself and Mr. Browder.

Q. Did you, Officer O'Driscoll, ask if he wanted to make a written statement?

A. No.

Q. Did you ever ask a court reporter or a stenographer to come in and take a written statement?

A. No, I did not, no.

Q. When you left the Browder apartment, was Mr. Browder handcuffed?

A. To the best of my knowledge, I don't remember. I don't remember. I don't think he was.

Q. You don't remember?

A. I don't remember. Let's leave it that way.

MR. MISSIRLIAN: That is all.

THE COURT: Any redirect?

MR. DRISCOLL: One more. That's all. Thank you.

THE COURT: You may step down.

THE WITNESS: Thank you.

(Witness excused.)

(out of the presence of the jury)

[226] MR. DRISCOLL: At this point, we are going to rest. May we have a sidebar and offer the exhibit?

THE COURT: Yes.

MR. DRISCOLL: At the sidebar, your Honor, outside the hearing of the jury, I am offering prior to resting, People's Exhibit 1, the only exhibit that has been marked for identification by the People in this case.

MR. MISSIRLIAN: I would have an objection, waiving argument on it.

THE COURT: All right, it will be admitted and the identification mark will be stricken.

MR. MISSIRLIAN: For the record, I will make a motion for a directed finding at this time.

THE COURT: Without argument?

MR. MISSIRLIAN: Without argument.

THE COURT: Motion for a directed finding will be denied.

MR. MISSIRLIAN: We will be ready.

. . .

Within the hearing of the jury:)

[228] MR. DRISCOLL: May I proceed, your Honor?

THE COURT: Yes, please do.

MR. DRISCOLL: May it please the Court and ladies and gentlemen of the jury, the People are about at this point to rest their case in chief and prior to doing so, the People are offering into evidence its Exhibit No. 1, previously marked for identification, the photograph of the lineup. We offer that in evidence at this time, your Honor.

THE COURT: People's Exhibit 1 for identification will be admitted into evidence and the identification mark will be stricken and it will be marked People's Exhibit 1 in evidence.

[229] MR. DRISCOLL: Also at this time, ladies and gentlemen, there will be a stipulation or an agreement between each side in this case, respectively, the People of the State

of Illinois through myself and Mr. Salas as Assistant State's Attorneys and the defendant in his own proper person, through his counsel, that the age of Ben E. Browder is now 18 years of age. So stipulated?

MR. MISSIRLIAN: So stipulated.

MR. DRISCOLL: With that, your Honor, with that stipulation, we would rest our case in chief.

THE COURT: Very well.

MR. DRISCOLL: Thank you, ladies and gentlemen.

MR. MISSIRLIAN: Your Honor, the Defense will be ready to proceed. We will call Mr. Browder to the stand.

DIRECT EXAMINATION

By MR. MISSIRLIAN:

[230] Q. Will you give us your name, Ben, and spell the last name for the court reporter, please?

A. Ben Earl Browder, B-r-o-w-d-e-r.

Q. How old are you, Ben?

A. 17—just turned 18.

Q. Where do you live?

A. 4053 West Monroe.

Q. Who do you live there with?

A. My mother.

Q. Do you have any brothers or sisters who live there with you?

A. Nine brothers and three sisters.

Q. Now, directing your attention to January 30th, 1971, Ben, did you rape and rob Johnnie Mae Johnson on that day?

A. No.

Q. Do you remember the first time you saw Johnnie Mae Johnson?

A. When she came in court—in the police station.

Q. Now, Ben, when you were at the police station on January 31, 1971, did you ever tell any police officers [231] that you raped Johnnie Mae Johnson?

A. No.

Q. Did you ever give any of these police officers any statements?

A. No.

MR. MISSIRLIAN: That's all.

CROSS EXAMINATION

By MR. DRISCOLL:

Q. Mr. Browder, you live at 4053 West Monroe Street, is that correct?

A. That's right.

Q. That's about a block from 4148 West Adam?

A. Two blocks.

Q. Two blocks. How long have you lived in the area of 4053 West Monroe?

A. About nine years.

Q. Now, you were arrested on January 31, weren't you?

A. Yes, sir.

Q. At your home?

A. Yes, sir.

Q. The police came there and arrested you for investigation of rape, isn't that right?

[232] A. No, sir. They didn't tell me that, about investigation for rape. They didn't tell me nothing.

Q. Four policemen came into your house, isn't that correct?

A. Yes, four policemen came over.

Q. The same four gentlemen that testified here in court, is that correct?

A. Yes, sir.

Q. They weren't wearing uniforms, were they?

A. They were in plainclothes.

Q. They took you to the police station, is that right?

A. Yes, sir.

Q. And you were placed in a lineup?

A. Yes, sir.

Q. And photographed, is that correct?

A. Yes, sir.

Q. Now, when you went to the police station, you put your outer clothing on and your hat, is that right?

A. Yes, sir.

Q. That was the clothing you were wearing in the lineup?

A. Yes, sir.

[233] Q. White tam?

A. Yes, sir.

Q. All right. You had an earring in your ear on that day, didn't you?

A. I had an earring on.

- Q. You don't have it on now, do you?
 A. No, sir, I don't have it on.
 Q. You had it on you on January 30th, didn't you?
 A. No, sir.
 Q. You just put it on the 31st?
 A. Yes, sir.
 Q. You have a pierced ear, don't you, sir?
 A. Yes, sir.
 Q. You wear an earring in that ear, don't you?
 A. Yes, sir.
 Q. How long have you been wearing an earring in your ear?
 A. About two years.
 Q. On January 30th, 1971, you had a pierced ear, isn't that right?
 A. Yes, sir.
 Q. You had an earring—
 A. No, sir.
 [234] Q. —to go through the pierced ear?
 A. No, sir, I didn't have an earring on January 30th.
 Q. Do you remember that clearly?
 A. Yes, sir.
 Q. Did you have one on January 25th in your ear?
 A. No, sir.
 Q. How about the 28th?
 A. No, sir.
 Q. You had it on when you were arrested?
 A. Yes, sir.
 Q. Did you have it on the day after you were arrested?
 A. No, sir.
 Q. Where is your earring now?
 A. Where is it now?
 Q. Yes.
 A. I left it downstairs.
 Q. Now, on January 30th, your hand was in a bandage or some type of cast on your arm?
 A. In a bandage, not no cast.
 Q. A bandage? You had that bandage on January 30th, isn't that right?
 A. Yes, sir.
 [235] Q. You had it on the 31st on your arm?
 A. Yes, sir.
 Q. All right. Now, this bandage left your fingers free, didn't it, sir?

- A. Yes, sir.
 Q. Were your fingers covered by the bandage?
 A. Yes, sir.
 Q. Completely covered?
 A. Yes, sir.
 Q. Couldn't move your fingers at all?
 A. Yes, sir.
 Q. This is the way it was on January 31st?
 A. Repeat that again.
 Q. Was the bandage on your hand on January 31 when you were arrested?
 A. Yes, sir.
 Q. And it completely covered your fingers, is that right?
 A. Yes, sir.
 Q. Your fingers were not visible then with the bandage on?
 A. I had went to the doctor that Friday.
 Q. My question is, your fingers were not visible [236] on January 31st from the bandage, is that right?
 A. Yes, sir.
 Q. Mr. Browder, would you look at People's Exhibit No. 1 in evidence and see if you see yourself in that photograph?
 A. Yes, sir.
 Q. Where are you in that photograph?
 A. In the center.
 Q. Do you see anything on your right arm in that photograph?
 A. Yes, sir.
 Q. Do you see your fingers visible?
 A. Yes, sir.
 Q. And the bandage didn't cover your fingers on that day, did it?
 A. Yes, it covered the fingers.
 Q. Your fingers are visible, aren't they?
 A. Yes, sir.
 Q. So the bandage did not cover your fingers?
 A. It come all the way down.

THE COURT: I think we ought to clarify the terminology a little bit.

MR. DRISCOLL: Judge, I will.

- [237] Q. Mr. Browder, on January 31st and the 30th, were any of your fingers sticking out of the bandage?

A. No, sir. They were not sticking out then. The whole hand was covered.

Q. Your whole hand was covered when you were in the lineup?

A. No, sir, not then, about a week before then.

Q. So your whole fingers were not covered on the 30th?

A. No, sir.

Q. You are right handed, aren't you?

A. Yes, sir.

Q. Your right fingers on your—your fingers on your right hand were flexible and movable on January 30th?

A. It was movable.

Q. You were able to put your clothes on and everything?

A. With the left hand, yes.

Q. Where were you on January 30th at 5:45 p.m.?

A. At the house.

Q. Do you remember that clearly?

A. Yes, sir.

Q. All right, what time did you get to your house on January 30th before 5:45?

[238] A. I had left out, went to the store, came back then, left out with some more friends and came back in.

Q. Who was there with you around between 5:00 and 6:00 p.m. at your house?

A. My brother, my mother, my brother's girlfriend and one of my partners.

Q. Give the ladies and gentlemen of the jury these people's names, please, names of the people who were there? I'm talking about January 30th.

A. My mother, Lucille Browder, my brother, Tyrone Browder, brother's girlfriend, Sherry Fletcher, my brother's partner, Stanley Polk, and my partner, Milton Dale.

Q. Your partner?

A. Milton Dale, he was there.

Q. Did you leave your house on January 30th at any time?

A. Yes, sir.

Q. What time did you go out?

A. Went to the store about 5:00, came back.

Q. What time did you get back to your house?

A. About 5:15, 5:30.

Q. What store did you go to?

[239] A. On the corner of Monroe and Pulaski.

Q. Did you see anybody at that store?

A. Yes, yes, sir.

Q. Do you remember the names of the people that you saw?

A. No, sir.

Q. Did you buy anything there?

A. Yes, sir.

Q. You got back to your house between 5:15 and 5:30, is that right?

A. Yes, sir. Around 5:15. Left out about five minutes to.

Q. So when you got back there, all these people you mentioned were in your house?

A. Yes, sir.

Q. Did you see them?

A. Yes, sir. they were ther when I left.

Q. They were there when you came back, is that right?

A. Yes, sir.

Q. Now, what were you wearing on that day, January 30th, when you came back from the store?

A. I had a green coat on and brown khakis, hat and [240] a white shirt.

Q. You wore a white tam when you went out?

A. No, I didn't have a white tam on then.

Q. Now, did you go out of the house again after you came back between 5:15 and 5:30?

A. Yes, sir.

Q. You did go out?

A. Yes, sir.

Q. What time did you go out again?

A. About 6:00.

Q. All right, where did you go?

A. Over on Wilcox, 4049 West Wilcox.

Q. Now, that's between your house and the 4000 block on Adam, isn't that right?

A. Yes, sir.

Q. This was around six o'clock?

A. It was something to six.

Q. How close to six?

A. About 20 minutes or 15 minutes to six.

Q. So it would have been about quarter to six when you went out of your house?

A. I can't exactly say what time it was.

Q. Did you go out with anybody or did you go out [241] alone?

A. I went out with my partner, Milton Dale.

Q. Milton Dale?

A. Yes.

Q. Where does Milton live?

A. I don't know. We were supposed to work.

Q. He is your partner, is that correct?

A. Yes.

Q. You don't know where he lives?

A. I know he used to live on Madison but he moved.

Q. Where did you two go?

A. Went over to Larry Mason's house.

Q. What time did you get to Larry's house?

A. We walked straight through the alley out of the back of my house, came through the alley and went through a gangway and went over to his house on Wilcox.

Q. So you went down an alley?

A. To Monroe Avenue.

Q. Did you see anybody on the street walking?

A. No, sir.

Q. Did you see any young girl walking?

A. No, sir.

[242] Q. Did you see any young girl walking?

A. No, sir.

Q. Where does Larry live?

A. Where he live then?

Q. Yes. Where did you go, what is the address there?

A. 4029 West Wilcox.

Q. Now, Wilcox would be right between Monroe and Adam, is that right?

A. Yes, sir.

Q. What time did you get to Larry's house?

A. We left out of the house with him about six. We got there about something to six. We got by the house and I can't remember what time it was we got there, after we left, two or three minutes.

Q. Where did you go then?

A. We stayed up in his house for a little while, about 8:00.

Q. Did you leave his house before 8:00?

A. No, sir.

Q. So you were there around 7:30?

A. We were there until about 8:00 and we left something after 8:00.

[243] Q. Who was at Larry's house when you left?

A. His brother Byron and his other brother Tyrone and his mother.

Q. Now, when you were walking out on the street between Monroe and Wilcox, between Monroe and Wilcox, what were the weather conditions that night?

A. I don't know.

Q. January 30th, right?

A. It was kind of cold.

Q. Was there any snow on the ground?

A. Not that much.

Q. Now, was your partner with you all the time when you were at Larry's house?

A. Yes, sir.

Q. Were you working at that time?

A. Was I working?

Q. Yes, at the time during that months of January, were you employed?

A. No, sir.

Q. Did you ever have a gun that day?

A. No, sir, never carry a gun.

Q. Did you have any money with you when you left your house to go over to Larry's house?

[244] A. No, sir.

Q. Did you have any money with you at all that evening?

A. No, sir.

Q. Did you have any money when you went to the store?

A. Yes, sir.

Q. Did you spend it all there?

A. It wasn't mine.

Q. Whose money was it?

A. My mother's.

Q. Where did you go at eight o'clock?

A. We went out to Maywood.

Q. Maywood?

A. Yes.

Q. The town of Maywood?

A. Yes.

Q. Did you see anybody when you got there?

A. Yes.

Q. Name the person you saw?

A. We was out at a dance on 9th Avenue and Madison at

a recreation hall. We seen a couple of more of our partners and girls that we know.

[245] Q. Now, how did you get out to Maywood?

A. We went in Larry Mason's brother's car.

Q. What kind of car was he driving?

A. '66 Wildcat.

Q. Did you ever hear the name Johnnie Mae Johnson before you were arrested?

A. No, sir.

Q. Did you ever see the young lady that testified here in court, Johnnie Mae Johnson?

A. No, sir, never seen her before.

Q. When you got out to Maywood, did you have to pay to get into this dance?

A. Yes, sir.

Q. You didn't have any money with you?

A. Larry Mason paid the way.

Q. What time did you get home that night after the dance?

A. About two or three.

Q. Anybody home when you got home?

A. Yes, sir.

Q. Were they up?

A. No, sir.

Q. Did you see your mother when you got home?

[246] A. No, sir. I went around through the back way.

Q. Now, you were arrested on January 31st. The police came to your home in the evening, is that right?

A. Yes, sir.

Q. They called and they told your mother they were coming?

A. I don't know if they called or not. I was in the kitchen watching TV.

Q. When you were arrested, you weren't handcuffed, were you?

A. Not that I recall. I can't remember.

Q. The police didn't tell you what they were arresting you for?

A. No.

Q. Did you ever hear the word rape mentioned while you were in the apartment with police officers?

A. No, sir.

Q. Then you couldn't have denied anything about a rape if you didn't hear about it?

A. They said I raped Johnnie Mae Johnson.

Q. Then you did hear the word mentioned in your apartment, didn't you?

A. They didn't tell me nothing. They came in there [247] and told me, told my mother they were taking me down to the station.

Q. You couldn't have denied it because you didn't know what you were arrested for, did you, is that right?

A. Yes, sir.

Q. So you didn't deny it?

A. I did not deny what?

Q. You didn't deny raping anybody when you were arrested in your apartment?

A. They didn't tell me what I was arrested for.

Q. They told you your rights when they arrested you, didn't they?

A. No, sir.

Q. Didn't they tell you that you had a right to remain silent?

A. No, sir, they didn't tell me nothing at all.

Q. Didn't they tell you that at the station?

A. No, they didn't tell me that.

Q. They never told you at all?

A. They never told me.

Q. They didn't hit you or anything, did they?

A. No, sir.

[248] Q. They didn't threaten you?

A. No, sir, they didn't threaten me.

Q. And you were not handcuffed at the police station, were you?

A. No, sir.

Q. Now, you were placed in a lineup, isn't that right?

A. Yes, sir.

Q. In the lineup were four other young men?

A. Yes, sir.

Q. And you were told to tell your name, isn't that right, and your address?

A. Yes, sir.

Q. And in that lineup, you were wearing your white hat, tam?

A. Yes, sir.

Q. What color coat were you wearing?

A. Black coat.

Q. Your hand was in a bandage?

A. Yes, sir.

Q. You were wearing a gold earring?

A. I don't know what color earring it was.

Q. What color earring was it?

[249] A. I don't know, I don't remember that.

Q. You put it in your ear that day, isn't that your testimony?

A. Yes, sir.

Q. You can't remember the color?

A. No, sir.

Q. How many earrings do you have?

A. I have got quite a few.

Q. Now, after the lineup, did you talk to any police officers?

A. No, sir.

Q. Did you ever speak after the lineup?

A. No, sir.

Q. Never said a word to anybody?

A. No, sir.

Q. Weren't you taken downstairs in the lockup and fingerprinted?

A. Yes, sir.

Q. Didn't they ask you your name and address?

A. Yes, sir.

Q. So you did speak when you were downstairs?

A. Yes, sir, just the only officer that I speak to.

Q. You saw the officers that testified here, didn't [250] you?

A. Yes.

Q. You heard what they testified to?

A. Yes, sir.

Q. It is your testimony that you never said anything to them at all?

A. Didn't say anything to them at all.

Q. Then Johnnie Mae Johnson pointed you out in the lineup, didn't she?

A. Yes, sir.

Q. Did you tell the police you were at home on the 30th after the lineup?

A. Yes, sir.

Q. You told them that?

A. Yes, sir.

Q. You told them the same thing you told everybody here in court today?

A. Yes, sir.

Q. Now, just so I have this story, Mr. Browder, after the lineup—

MR. MISSIRLIAN: Your Honor, I am objecting.

THE COURT: Well, I don't know what the question is. Go ahead.

[251] MR. DRISCOLL: Q. When did you tell the police officers that you had been home on the 30th with all these people you named and went out to Maywood?

A. When I had told them?

Q. When did you tell them that?

A. When they came to the house. I told them that I didn't know nothing about it.

Q. They didn't tell you what you were charged with, did they? Isn't that your testimony?

A. They had told me at the station. After the lineup, they took me in the Youth Office, Sergeant Flynn's office.

Q. All right, so they did take you in an office?

A. Sergeant Flynn's office. All four of us together and I told them where I was. Me and my brother and all of them were in the same room and I told them that.

Q. What is your brother's name?

A. Tyrone.

Q. Go ahead.

A. Tyrone.

Q. What are the other two boys' names?

A. One is named Stanley Polk and Milton Dale.

Q. And Milton Dale was your partner who you were [252] with on the 30th between five and six, isn't that right?

A. Yes, sir.

Q. Do you remember what your brother was wearing in the lineup?

A. He had a brown coat and black hat and brown khakis on and black shoes.

Q. Was he wearing a hat?

A. Yes, sir.

Q. What color hat was he wearing?

A. Black.

Q. You don't know what color earrings you had on?

A. No, sir.

Q. What hand was bandaged?

A. The right hand.

Q. So these three other people were present when you told the police officers what you are telling us here today?

A. Yes, sir.

Q. They heard your testimony with police officers?

A. Yes, sir.

Q. And then they were released, isn't that right?

A. Yes, sir.

Q. Did you talk to the police officers after that?

[253] A. No, sir. They took me back down and fingerprinted me and took my picture.

Q. So the police were lying, is that what you are saying?

MR. MISSIRLIAN: Objection.

THE COURT: Sustained.

MR. DRISCOLL: Q. Did you say anything to Johnnie Mae Johnson at the lineup?

A. No, sir.

Q. Did you see her point you out?

A. No, sir.

Q. A few more questions, Mr. Browder. I will be all done now. When you were in the lineup, you stated your name and address?

A. Yes, sir.

Q. You stated your name Ben Browder?

A. Yes, sir.

Q. Did you say anything else after your name and address?

A. "Don't look at me". I was told to say that.

Q. Again I'm going to show you People's Exhibit 1. Do you see an earring in your ear in that picture?

A. Yes, sir.

[254] Q. And that is the earring you were wearing?

A. Yes, sir.

Q. As you look at the picture, can you tell us what color earring you were wearing?

A. No, sir.

MR. DRISCOLL: That's all.

THE COURT: Any redirect?

MR. MISSIRLIAN: One question.

REDIRECT EXAMINATION

By MR. MISSIRLIAN:

Q. Ben, when you were in the lineup, was anybody else wearing an earring?

A. Yes, sir.

Q. Who was wearing an earring?

A. I think Nelson Love and my partner, Milton Dale.

MR. MISSIRLIAN: That is all.

RECROSS EXAMINATION

By MR. DRISCOLL:

Q. Who else was wearing an earring?

A. I think Nelson Love and Milton Dale had on one.

Q. Did you know Nelson Love before the lineup?

A. Yes, I know Nelson Love.

Q. Point out Nelson in the picture here, please.

[255] A. (Indicating.)

MR. DRISCOLL: Indicating for the record the man on the far right.

Q. Who is the other man you say was wearing an earring?

A. Milton Dale.

Q. The man who is your partner?

A. Yes.

Q. Which ear is Nelson wearing it?

A. Supposed to wear it in the right.

Q. Which ear is your partner wearing the earring in?

A. The left.

Q. Now, Nelson wasn't arrested with you in your house, was he?

A. No, sir.

MR. MISSIRLIAN: Your Honor, I will object.

THE COURT: Sustained.

MR. DRISCOLL: Mr. Reporter, would you mark this People's Exhibit 2 for identification, please?

(Thereupon, said photograph was marked People's Exhibit No. 2 for identification.)

Q. Mr. Browder, I am going to show you what is marked [256] as People's Exhibit 2 for identification purporting to be a photograph and ask you to look at that.

Do you see yourself in that photograph?

A. Yes, sir.

Q. You are in the center, is that right?

A. Yes, sir.

Q. Nelson is on the far right?

A. Yes, sir.

Q. And in this picture, you can see the right side of his head?

A. Yes, sir.

Q. And he is wearing an earring in his right ear?

A. On that picture, he had on earrings, I don't know for sure.

Q. Do you see an earring in this picture, in Nelson's right ear?

A. No, sir.

MR. DRISCOLL: That's all.

MR. MISSIRLIAN: Thank you very much.

THE COURT: You may step down. Thank you very much.

(Witness excused.)

MR. MISSIRLIAN: Your Honor, the Defense will rest and is ready to proceed in final argument.

[257] THE COURT: The defense rests. Are we ready to proceed?

MR. DRISCOLL: Ready to proceed, your Honor.

THE COURT: All right. Then at this time, ladies and gentlemen, with both sides having rested, the State's Attorney will make a closing argument and then the Attorney for the Defense may make a closing argument, after which the State's Attorney will make a rebuttal.

If you are ready to proceed, gentlemen, we can go right ahead now.

MR. DRISCOLL: The matter of instructions, your Honor?

THE COURT: Let's go ahead now.

CLOSING ARGUMENT

By MR. DRISCOLL:

May it please the Court, Mr. Missirlian, Mr. Salas and ladies and gentlemen of the jury:

At this point, both sides having rested their case, you have heard all the evidence that you will hear in this case.

Now, on behalf of the State, it is my duty in this case to make what is called the opening portion of closing argument. As the Court says, the State [258] has the burden and has two opportunities to address you.

I will make the opening statement and Mr. Missirlian, I presume, will make a closing argument and my partner, Mr. Salas, will make a final argument to you.

. . .

[265] You have heard the police officers testify, [266] four officers that went to the house to arrest the defendant. The Investigator from the Homicide-Sex Unit of Area 4 was called in in this type of case. They were present at the 11th District on the 31st of January. You heard the officer testify that the defendant was arrested with those other three men, advised of his rights, taken to the 11th District to be placed in a lineup. At the 11th District, you heard that Johnnie Mae Johnson had made an identification of him.

. . .

[268] The defendant decided to take the stand in this case. I want to comment on that because I think it is worth commenting upon. Ben Browder got up here this morning. Counsel asked him, "Did you rape Johnnie Mae Johnson?" "No." Obviously not or we wouldn't be here. He stated he didn't have a gun. That's about [269] it.

On cross examination, I asked him where he was at the time of the rape. He is at home. Eight or nine other people there, his mother, brother, friends, partner. Where are these people? Why didn't they come forward to tell you that this defendant, he was not out in the basement.

MR. MISSIRLIAN: Your Honor, I will object.

THE COURT: Proceed, counsel.

MR. DRISCOLL: Thank you. Nobody got up there. Where are these other people? Where is Larry over on Wilcox or wherever it is? Why aren't these people in here if that's the truth? Where are all these people? If the defendant wasn't out on the street, where are all these people? They can come forward and tell you. His own mother could say he was at home, he wasn't out raping anybody. You didn't hear that, ladies and gentlemen, because it didn't happen that way. He was out in the basement with Johnnie Mae Johnson.

The defendant asks you to believe his testimony. Based upon his testimony, he would ask you to find him not guilty, to show that there is a reasonable doubt of guilt.

[270] Well, I submit if you believe that testimony that much, something like that, uncorroborated by anyone else, then cut him loose, out the door he will go and, well, God help anybody else because this man does not deserve to go back out on Van Buren or Adam or Wilcox or Monroe, not from what he did to Johnnie Mae Johnson.

I submit, ladies and gentlemen, that you are not going to be fooled by this kind of testimony, mere denial, no corroboration of where he was, nothing, nothing. He asks you to believe him, but he mentions all of these other people. It is uncorroborated. You have to determine if Ben Browder is telling the truth in this case. I submit, ladies and gentlemen,—

MR. MISSIRLIAN: Object.

THE COURT: Proceed, counsel. I will sustain the objection. Proceed with your comments.

• • •

[271] In Mr. Missirlian's opening arguments, he [272] mentioned two issues that he wants you to consider. I think they are important, the issue of identification which I have talked about. That is an important thing because that is what we are here for, to determine if Ben Browder is in fact guilty, guilty after the identification, the testimony of Johnnie Mae Johnson.

I don't think that she made the wrong identification. She picked out the man who raped and robbed her as it happened on January 30th.

• • •

[274] One last point I would like to make. Counsel in his opening statement said you have to determine whether an admission was made by Ben Browder. Again, it becomes an issue of credibility, if you believe Ben Browder or if you disbelieve three police officers. You heard them. That is your determination to make. You think the officers got up here and lied?

MR. MISSIRLIAN: Objection.

MR. DRISCOLL: It is a matter of credibility.

THE COURT: Sustained.

MR. DRISCOLL: Ladies and gentlemen, I will ask you to find this defendant guilty, we asked you at the beginning and we will ask you at the end. We have met our burden. It becomes your duty now to resolve the issues, seeing what the verdict will be, and as to your determination, I know you will make a faithful determination, following the evidence with the Court's rulings at the beginning.

We thank you for your attention. Thank [275] you very much.

• • •

(Conference on jury instructions, Tr. 275-78, omitted.)

[278] THE COURT: All right, be seated, please. Mr. Missirlian?

MR. MISSIRLIAN: Your Honor, based on the evidence, we would waive final argument.

THE COURT: Final argument is waived. All right.

(Jury instructions, Tr. 278-93, omitted.)

• • •

[295] THE COURT: All right, you may be seated, please. Mr. Foreman, have you reached a verdict?

THE FOREMAN: Yes, we have.

• • •

THE COURT: The verdicts are:

"We, the jury, find the defendant, Ben E. Browder, guilty of rape."

"We, the jury, find the defendant, Ben E. Browder, not guilty of armed robbery."

• • •

(Proceedings of September 28, 1971)

[298] MR. MISSIRLIAN: Your Honor, this is Mr. Browder before the Court in Indictment No. 71-1081 in which there has been a finding of guilty by a jury; and Indictment No. 1079 yet to be disposed of.

On Indictment No. 1081 I believe I have a motion for new trial.

THE COURT: All right. The record will reflect a motion for new trial has been filed.

Do you wish to argue it?

[299] MR. MISSIRLIAN: Yes, if I may have a moment.

Your Honor, this was a jury trial, as the Court is aware, and there were two charges, Mr. Browder was first charged with armed robbery and then rape. The jury came in with a finding of not guilty as to the armed robbery and guilty as to the rape.

First I'd like to say to this Court, I feel that the verdicts were inconsistent by the jury, I think it was a compromised verdict, the jury felt Mr. Browder was guilty of something so they decided that rape should be the charge.

Secondly, there was no competent evidence of corroboration as to the victim's testimony, or prosecutrix' testimony, as to the rape. There were no fingerprints, no gun recovered, there was no officer who testified that he returned to the scene, there was no competent medical testimony that a rape in fact had occurred. The only testimony was by the victim and, in fact, she testified that she made some comment to some other people that she had been raped after, to some people, but no witnesses were brought in to testify to this fact.

Another point I'd like to bring out on [300] the motion for new trial, I feel that the Court was in error when it denied the defendant's motion to suppress the in court identification or, in the alternative, the lineup that was conducted in this cause, pictures of that lineup were introduced, the jury had an opportunity to look at these pictures and the State made great reference to the lineup, at the lineup the defendant was one of only two individuals who had a white tam on, the defendant was one of two individuals who had an earring, the defendant was the only individual to have a cast or a white bandage on his arm. These facts and plus the description of the individual and the clothing that he allegedly wore at the time of the rape coincided to what the defendant, Mr. Browder, wore at the time of the lineup. The police were aware of that. Who else could the prosecutrix pick out at that lineup than the man with the bandage on his hand? The police officer did not testify they could have removed the bandage as they could have, it was not a cast as the Court is aware but a bandage, and this could have been removed to allow a fair lineup. All of the participants could have wore white tams or wore no hats at all. We feel [301] that the Court erred in at least not allow-

ing the lineup to be brought in, if at all, allowing the in court identification. At this point we'll rest on the facts.

THE COURT: All right. Do you care to respond?

MR. SALAS: Briefly in reply as to the allegation regarding the inconsistency of the verdicts, one of the elements of rape is that some form of force is applied, the fact that the jury may not have found him guilty of armed robbery in no way is inconsistent since in order to find that someone committed the offense of rape they would show some element of force which certainly the victim testified to in this cause, and that Ben Browder did force her down into this basement area. I don't feel that by the mere fact that the jury did not find the defendant guilty of armed robbery that this is necessarily an inconsistent verdict.

* * *

[302] Regarding the lineup, the court heard motions to suppress the identification, this court denied motions to suppress the identification. There is no question that the victim had an independent opportunity to observe. The Court will recall she testified in the motion that she had seen Mr. Browder as she passed an alley, she seen Mr. Browder again as she was turning a corner, she had seen Mr. Browder during the period that they were down in the basement, she had seen Mr. Browder during the period they were leaving the basement, she had seen Mr. Browder when they had gone out into the alley, she had seen what Mr. Browder was wearing and he had a gun in his hand with the bandage. This is an extremely unusual type of defendant, unusual looking defendant, your Honor, where he has a [303] bandage on one hand. Counsel would expect the police to remove the bandages, et cetera, from the man's hand and perhaps endanger his health in some form or another. I submit, under the circumstances, the fairest lineup that was possible was held, and in light of the fact the victim had independent opportunities to observe and that the fairest lineup under the circumstances was had, all young male Negroes approximately the same height, the Court will remember this was testified to by the victim.

I believe the motion for new trial made by defense counsel

is unsupported and the State would request the motion for new trial be denied.

THE COURT: The motion for new trial is denied.

* * *

(Sentencing proceedings, Tr. 303-10, omitted.)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

(Title omitted in printing)

MEMORANDUM AND ORDER

Petitioner, presently in state custody, seeks a writ of habeas corpus pursuant to 28 U.S.C. Section 2254. Under the circumstances of this case, once having directly appealed his conviction, petitioner was not required to seek relief on the same issue under the Illinois Post Conviction Hearing Act to satisfy the doctrine of exhaustion of state remedies applicable in federal habeas corpus actions. See *U.S. ex rel Gates v. Twomey*, 325 F.Supp. 920 (N.D. Ill. 1971) and *U.S. ex rel Williams v. Brantley*, 502 F.2d 1383 (7th Cir. 1974). However, petitioner has an appeal from the denial of post conviction relief pending in the Illinois Appellate Court, First District. Therefore, as a matter of comity, the Court will stay proceedings in this cause until such time as the Illinois court rules or dismisses the case on petitioner's motion for voluntary dismissal.

WHEREFORE, the proceedings are stayed.

IT IS SO ORDERED.

Dated: March 7, 1975

/s/ Joel M. Flaum
United States District Judge

IN THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

No. 60582

PEOPLE OF THE STATE OF ILLINOIS,	}	Appeal from the Circuit Court of Cook County. Honorable Philip Romiti, Presiding.
<i>Respondent-Appellee,</i>		
v.		
BEN EARL BROWDER,		
<i>Petitioner-Appellant.</i>		

(Opinion filed June 2, 1975)

Before MCGLOON, P.J., DEMPSEY and McNAMARA, JJ.

PER CURIAM:

Ben Earl Browder, petitioner, appeals the denial of his post-conviction petition filed pursuant to the Post-Conviction Hearing Act (Ill. Rev. Stat. 1973, ch. 38, par. 122-1 *et seq.*) without an evidentiary hearing.

Petitioner was originally charged by indictment with the crimes of armed robbery and rape. After a jury trial he was found guilty of armed robbery and sentenced to a term of four to fifteen years. Petitioner appealed to this court which on July 2, 1973, affirmed the judgment of conviction. (*People v. Browder* (1973), 13 Ill. App.3d 198, 300 N.E.2d 511. The Illinois Supreme Court denied leave to appeal.) On August 16, 1973, petitioner filed a post-conviction petition. Upon motion of the State, on December 13, 1973, petitioner's post-conviction petition was denied without an evidentiary hearing.

Petitioner appeals arguing that he was entitled to an evidentiary hearing on the allegations in his post-conviction petition: (1) he was denied the effective assistance of counsel in that trial counsel failed to secure four alibi witnesses and failed to move to suppress the fruits of petitioner's apparently unlawful arrest and (2) he was improperly denied his constitutional right to counsel at his lineup identification.

Petitioner's first contention on appeal is that he was entitled to an evidentiary hearing on the allegation in his post-conviction petition that trial counsel was incompetent in that he failed to secure four alibi witnesses. In order to

show a deprivation of a constitutional right to counsel, petitioner must clearly establish [2] actual incompetency of counsel as reflected by the manner of carrying out his duties as the trial attorney and substantial prejudice resulting therefrom without which the outcome would probably have been different. *People v. Lynch* (1973), 11 Ill. App.3d 479, 297 N.E.2d 382.

In the case at bar, petitioner, in an affidavit attached to his post-conviction petition, stated that prior to trial he had informed defense counsel of the existence of four alibi witnesses, two of whom were defendant's mother and brother, but that defense counsel informed him that the presence of the alibi witnesses would not be necessary. As pointed out in this court's affirmance of defendant's conviction "• • • the proof left no doubt whatsoever of his (defendant's) guilt." Indeed, a review of the evidence adduced at trial demonstrates that the State's case was overwhelming. The evidence adduced at trial revealed that the crime occurred at approximately 5:45 p.m. Defendant's testimony at trial established that his alibi witnesses would only have testified to his presence from 5:30 p.m. and thereafter. Petitioner's affidavit stated that although counsel was aware of the four alleged alibi witnesses, he chose not to call them at trial. Under these circumstances, we conclude that the failure to call the alibi witnesses was a matter of trial tactics and does not demonstrate incompetency of counsel. (*People v. Talasch* (1974), 20 Ill. App.3d 794, 314 N.E.2d 510.) As pointed out in a specially concurring opinion in affirming petitioner's conviction "This record shows that defendant was quite ably represented in the trial court." The record in its entirety establishes that trial counsel at all times properly represented the petitioner considering the fact that he was faced with an extremely strong State's case. We believe that defendant received adequate and competent representation at trial.

Petitioner's next contention is that he was entitled to an evidentiary hearing on the allegation that his trial counsel was incompetent in that counsel failed to move to suppress the fruits of petitioner's unlawful arrest. In his post-conviction petition [3] filed in the trial court, petitioner argued that his arrest was illegal and that all things flowing

therefrom should have been suppressed as the fruit of the poisonous tree. However, petitioner did not allege that trial counsel was incompetent for failing to raise this issue. The rule is well established that where an argument is not raised in the post-conviction petition filed in the trial court, it may not be raised for the first time on appeal. *People v. Turner* (1970), 47 Ill.2d 7, 264 N.E.2d 145; *People v. Eldredge* (1969), 41 Ill.2d 520, 244 N.E.2d 151.

In addition, petitioner in his direct appeal argued that his arrest was illegal and that his identification and admissions following such arrest should have been suppressed as the fruit of the poisonous tree. The rule is well established that where defendant has appealed his conviction, any allegation which has been considered and rejected by the court in that appeal, cannot be reconsidered in post-conviction proceedings under the doctrine of *res judicata*. (*People v. Walker* (1972), 6 Ill. App.3d 909, 286 N.E.2d 812; *People v. Westbrook* (1972), 5 Ill. App.3d 970, 284 N.E.2d 695.) Petitioner having argued in his direct appeal that his arrest was illegal and that all things flowing therefrom should have been suppressed is now barred from any further reconsideration of that issue in post-conviction proceedings by the doctrine of *res judicata*.

Petitioner's final contention is that he was entitled to post-conviction relief on the allegation in his petition that he was denied his constitutional right to counsel at his lineup identification. In *Kirby v. Illinois* (1972), 406 U.S. 682, 32 L.Ed.2d 411, 92 S.Ct. 1877, the Supreme Court held that the right to counsel applies only at or after the time that adversary judicial proceedings have been initiated against him.

In *People v. Johnson* (1973), 55 Ill.2d 62, 302 N.E.2d 20, the defendant was found guilty after a jury trial of the crimes of murder and armed robbery. The facts adduced at trial showed that defendant was arrested at his home without a warrant and was taken [4] to the police station where a lineup was conducted. On appeal defendant argued that he had a constitutional right to counsel at the lineup. The Supreme Court rejected defendant's contention holding that adversary judicial proceedings had not yet been initiated at the time of defendant's lineup. See also *People v. Reese* (1973), 54 Ill.2d 51, 294 N.E.2d 288.

Similarly, in the case at bar, defendant was placed under

arrest at his home without a warrant and taken to the police station where a lineup was conducted. At the time of the lineup adversary judicial proceedings had not yet been initiated and the absence of counsel did not deny defendant any of his constitutional rights.

For the foregoing reasons the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

(Title omitted in printing)

ORDER

Order Petition for Writ of Habeas Corpus granted. Respondent given sixty days to retry the petitioner or the Writ of H.C. shall be executed.

Dated: October 21, 1975.

/s/ Joel M. Flaum
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

(Title omitted in printing)

MEMORANDUM OPINION

JOEL M. FLAUM, District Judge:

Before the court is the respondent's motion to dismiss the plaintiff Ben Browder's petition for a writ of habeas corpus. On August 27, 1971, petitioner Browder was convicted of rape in a jury trial before the Circuit Court of Cook County. He was sentenced to a term of four to fifteen years at the Illinois State Penitentiary at Stateville where he is presently confined. Petitioner, having exhausted his state remedies, seeks federal relief pursuant to 28 U.S.C. § 2254 on the grounds that his conviction was obtained by the use of evidence resulting from an allegedly unlawful arrest.

Based on the trial transcript, the facts surrounding the petitioner's arrest and subsequent conviction appear to be the following. On January 31, 1971, upon receiving information with regard to an alleged rape of a Ms. Alexander by a possible offender named Browder, a police officer assigned to the case scanned his files and discovered a listing of one Tyrone Browder, the petitioner's brother. [Trial record 30-31.] After learning that the petitioner and his brother Tyrone were at home, the police drove to the petitioner's residence. Upon arriving, the officers identified themselves and informed Mrs. Browder that they were looking for her son Tyrone with regard to an assault on a girl. The arresting officer testified that Mrs. Browder responded by remarking that she did not think it was her son Tyrone that they wanted, but rather her other son, Ben Earl. [Trial record 35.] The officers entered the residence without a search or arrest warrant. Present in the apartment was the petitioner, his brother Tyrone and two other male adults. The officers questioned the male adults, informed them of their constitutional rights, and told them they were being placed under arrest in connection with an "investigation of rape." [Trial record 163.] The four arrested were then transported to the district station house and placed in a line-up. Ms. Alexander viewed the line-up and identified the peti-

tioner as her assailant. The line-up was then viewed by Ms. Johnson, another rape victim, who also identified the petitioner as her assailant. Petitioner was tried and convicted for the rape of Ms. Johnson.

After the line-up, the petitioner asked if he could speak with the arresting officer and his partner. The arresting officer took the petitioner into a vacant office where the petitioner told him that he had raped Ms. Johnson, but not Ms. Alexander. [Trial record 52.] The petitioner was once again informed of his right to remain silent and his right to counsel. The arresting officer informed the Area Investigator that petitioner had made an admission, and petitioner was taken into another room where he repeated his statement to the Area Investigator. No written statement was ever taken.

Prior to trial, petitioner's appointed counsel moved to suppress the line-up identification and confession on the ground that the former was suggestive and that the latter was procured without giving the requisite *Miranda* warnings. The trial court ruled that the line-up was not constitutionally defective and that petitioner had been sufficiently informed of his rights on several occasions. The line-up identification, the statements and Ms. Johnson's in-court identification were introduced and admitted at trial.

The petitioner's counsel failed to challenge the constitutionality of the arrest at trial or in post-trial motions. Counsel raised the issue of the alleged unlawful arrest for the first time on direct appeal. On appeal, the Illinois Appellate Court held that under Illinois law, Browder had waived his right to challenge the constitutionality of his arrest because he failed to object to it at the trial. *People v. Browder*, 13 Ill. App.3d 193, 300 N.E.2d 511 (1973) (abstract only). Likewise, Browder was estopped from raising the issue of the arrest in his petition for post-conviction relief. *People v. Browder*, No. 60582.

The threshold issue raised by the respondent's motion to dismiss is whether failure to address the alleged unlawful arrest constituted a deliberate tactical waiver of the defect for purposes of federal habeas corpus relief.

The Supreme Court has stated that a claim should not be deemed waived for purposes of federal habeas corpus relief absent evidence that it was the result of a deliberate tactical decision to forego such a claim. *Fay v. Noia*, 383 U.S. 391

(1963). Moreover, as a waiver of a federal right is a federal question, a state court's finding of waiver does not bar an independent determination of the question by the federal courts. *Fay v. Noia*, *supra*. at 439. To forego a constitutional claim does not require a client's acquiescence and approval of every decision made by counsel. *U.S. ex rel Allum v. Twomey*, 484 F.2d 740 (7th Cir. 1973). Rather, waiver of a constitutional claim requires objective evidence that the omission was the result of an intelligent and deliberate relinquishment as a part of counsel's trial strategy, and not inadvertent or negligent mistake. *See generally, Henry v. State of Mississippi*, 379 U.S. 443, 451-52 (1965); *Pope v. Swanson*, 395 F.2d 321, 322-26 (9th Cir. 1968); *Curry v. Wilson*, 405 F.2d 110, 112-14 (9th Cir. 1968); *cert. denied*, 397 U.S. 973 (1970).

The *Twomey* court provided an objective test for the determination of what conduct constitutes deliberate waiver.

The question of whether there has been an effective (or "deliberate") waiver turns, we believe, not on subjective motivation, but on an evaluation of the act or omission giving rise to the waiver, as well as the significance of its consequences. 484 F.2d at 745.

Applying this test to the conduct of petitioner's counsel the court finds that failure to raise the alleged illegality of the petitioner's arrest does not constitute a conscious waiver that would bar this petition. Unlike *Twomey* where the court found that there was a reasonable tactical basis for failure to object to certain evidence, from the nature of evidence introduced at petitioner's trial no reasonable tactical basis is apparent to justify the failure to object.

As the alleged defect has not been waived, the issue before the court is twofold: was the petitioner's arrest unlawful, and if so does the unlawful arrest taint the evidence used in his criminal conviction? *Wong Sun v. United States*, 371 U.S. 471 (1963). For purposes of clarity these issues will be examined separately.

The test for the legality of a warrantless arrest has been framed by the Supreme Court in the following language:

Whether that arrest was constitutionally valid depends in turn upon whether at the moment the arrest was made the officers had probable cause to make it—whether at that moment the facts and circumstances

within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed . . . the offense. *Beck v. Ohio*, 85 S.Ct. 223, 225 (1964).

In the instant case the evidence in the record indicates no basis upon which the arresting officer might have formed a belief that petitioner Browder raped Ms. Alexander. Brief reference is made in the record to the origin of the investigation of Tyrone Browder, petitioner's brother. The arresting officer testified, "Well I had information regarding a rape of a Sharon Alexander and a possible offender named Browder." [Trial record 31.] The police sought Tyrone at the Browder residence where Mrs. Browder commented that the police probably wanted her other son, Ben Earl. The comment by Mrs. Browder that the police probably wanted Ben Earl cannot suffice for such "reasonably trustworthy information . . . to warrant a prudent man in believing that the petitioner committed the offense." *Beck v. Ohio, supra*. The fact that the police arrested all four black males in the residence (the petitioner, his brother and two unidentified persons) on a charge of "investigation of rape" lends further support to the petitioner's argument that the police acted without probable cause. *Davis v. Mississippi*, 394 U.S. 721 (1969); *Mallory v. United States*, 354 U.S. 449 (1957).

After examining the record the court finds no evidence sufficient to conclude that the arrest of petitioner Browder was made with probable cause. Accordingly the court concludes that the arrest was unlawful.

An illegal arrest does not necessarily render all evidence subsequently obtained inadmissible. The question of admissibility turns on whether "the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963). For purposes of analysis, the evidence of the line-up identification the oral confession and the in-court identification will be discussed separately to determine admissibility under *Wong Sun*.

The inquiry under *Wong Sun* is not a "but for" analysis, but rather one focusing on the specific intervening circumstances and events which may purge the taint of the original

illegality. The Seventh Circuit Court of Appeals has suggested three ways in which the taint may be purged: if the evidence was discovered by an independent source, if the evidence would have been gained inevitably without the illegality, or if the evidence is sufficiently distant in causal connection that the connection has become so attenuated as to dissipate the taint. *U.S. ex rel Owens v. Twomey*, 508 F.2d 858 (7th iCr. 1974). Applying these general concepts to the line-up identification by Ms. Johnson which was admitted at petitioner's trial, the court finds no support in the record for finding that the taint of the illegal arrest has been purged. As the petitioner was purposefully taken into custody in connection with the investigation of the rape of Ms. Alexander the first two criteria appear to be inapplicable. Further the record does not indicate that the line-up identification was sufficiently distant in causal connection as to dissipate the taint of the arrest. The line-up was held after the illegal arrest and no significant intervening factors are mentioned in the record which could purge the taint of the arrest. *Johnson v. Louisiana*, 406 U.S. 356 (1972). The respondent argues that as the line-up itself was not constitutionally defective or overly suggestive (a fact not clear from the record), the line-up has purged the taint of the illegal arrest. The respondent has cited no authority holding that a proper line-up held immediately after an illegal arrest and in the absence of any other intervening factor purges the taint of the primary illegality. Accordingly, the court finds that the taint of the illegal arrest was not purged prior to the identification by Ms. Johnson, thus that identification was tainted and inadmissible.

In evaluating the admissibility of an oral confession subsequent to an illegal arrest, the court must determine whether the causal chain between the illegal arrest and the oral confession has been broken. The respondent argues that two events have purged the taint of the original illegality: the line-up identification by Ms. Johnson and the proper giving of *Miranda* warnings. The court finds that neither of these events effectively dissipates the taint of the arrest. Petitioner made his oral confession after an identification by Ms. Johnson which this court has determined to be inadmissible. No intervening event between the line-up and the confession has been brought to the court's attention, thus on the facts before it the taint of the illegal arrest adheres

to the oral confession. The respondent also argues that the proper giving of *Miranda* warnings [Trial record 52] purges the taint of the arrest. In light of *Brown v. Illinois*, 95 S.Ct. 2254 (1975), this court cannot agree. In *Brown* the court clarified the interrelation of the Fourth and Fifth Amendments as regards oral confessions by noting:

If *Miranda* warnings by themselves were held to attenuate the taint of an unconstitutional arrest regardless of how wanton and purposeful the Fourth Amendment violation, the effect of the exclusionary rule would be substantially diluted . . . *Miranda* warnings alone and per se cannot always make the act sufficiently a product of free will to break for Fourth Amendment purposes the casual connection between the illegality and the confession . . . The voluntariness of the statement is a threshold requirement. And the burden of showing admissibility rests of course on the prosecution. 95 S.Ct. at 2261.

The court thus found the *Miranda* warnings are but one factor to be evaluated in conjunction with police coercion, and the temporal and physical proximity of the arrest in determining whether the statements were sufficiently an act of the free will to purge the primary taint. See, *United States v. Fallor*, 457 F.2d 15 (10th Cir. 1972). Evaluating these factors in light of the record, the court finds that the tainted line-up and the *Miranda* warnings did not purge the taint of the petitioner's illegal arrest.

The admissibility of a victim's in-court identification hinges upon whether it was sufficiently reliable because of an independent basis despite participation in a tainted line-up. *U.S. ex rel Kirby v. Sturges*, 510 F.2d 397 (7th Cir. 1975); *United States v. Ganter*, 436 F.2d 364, 371-72 (7th Cir. 1970).

The trial court's finding of fact with respect to petitioner's motion to suppress indicates that Ms. Johnson had sufficient opportunity "to observe, to note and to remember her assailant, apart and unaffected by any subsequent line-up identification." [Trial record 98.] After reviewing the record this court finds that the in-court identification was not the "fruit of the poisonous tree," but rather the product of an independent basis properly admitted at petitioner's trial.

Having found that tainted line-up identification and an oral confession were admitted at petitioner's trial, this court must determine the overall effect of that tainted evidence on the petitioner's conviction. As the Supreme Court noted in *Chapman v. California*, 386 U.S. 18, 24 (1967) "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." In applying this standard to the tainted evidence admitted at petitioner's trial, the court must make a determination based on a "reading of the record and on what seems to have been the proper impact" of the evidence. *Harrington v. California*, 395 U.S. 250, 254 (1969). Upon examining the record in the instant case this court cannot conclude that the tainted evidence introduced at petitioner's trial was harmless beyond a reasonable doubt.

Accordingly, the court finds the petition for a writ of habeas corpus is hereby GRANTED. The respondent is granted sixty days in which to retry the petitioner or the writ of habeas corpus shall be executed.

/s/ Joel M. Flaum
United States District Judge

Dated: October 21, 1975.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

(Title omitted in printing)

MOTION TO FURTHER STAY THE EXECUTION OF THE WRIT OF
HABEAS CORPUS AND TO CONDUCT AN EVIDENTIARY HEARING

The respondent by his attorney, WILLIAM J. SCOTT, Attorney General of the State of Illinois respectfully moves this Court to further stay the issuance of the writ of habeas corpus and to hold an evidentiary hearing on the merits of the issue presented by the petition. In support of this motion, respondent submits the following:

1. The petition for writ of habeas corpus was filed on January 8, 1975. Respondent filed a motion to dismiss the petition on February 11, 1975. Proceedings were stayed in this Court pending disposition of petitioner's Illinois appeal. (Memo. Op., 3-7-75).

On October 21, 1971, this Court denied respondent's motion to dismiss and issued a writ of habeas corpus and stayed execution for 60 days.

2. Respondent submits that this court erred in granting the writ without first conducting an evidentiary hearing to determine if in fact petitioner was arrested without probable cause and if so, whether his confession was thereby tainted.

3. The purpose of an evidentiary hearing in a habeas corpus proceeding under 28 U.S.C. § 2254 is to provide a plenary hearing where the facts on which the constitutional claim is based have not been adequately developed by the state court. *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745 (1963). *Townsend, supra*, clearly indicates that both the state and the petitioner have the right to present evidence outside the record on disputed issues. At p. 322. Further the Court of Appeals for the Third Circuit specifically held that the state and petitioner are on equal footing when claiming the right to a hearing and that the public interest demands that "the opportunity be given to present evidence which might show that the petitioner suffered no constitutional deprivation." *U.S. ex rel. McNair v. State of New Jersey*, 492 F.2d 1307, 1309.

4. A hearing is required because there has *never* been, in state or federal court, an examination of the facts leading to petitioner's arrest. The probable cause issue was never raised in the trial court and the events leading up to petitioner's arrest were alluded to, but never fully explored, in the hearing on the motion to suppress. Indeed from a preliminary inquiry into matters outside the record it appears that one could reasonably believe that probable cause did exist.

5. In granting the writ this court stated:

"In the instant case the evidence in the record indicates no basis upon which the arresting officer might have formed a belief that petitioner Browder raped Ms. Alexander. . . . After examining the record the court finds no evidence sufficient to conclude that the arrest of petitioner Browder was made probable cause."

Memo Op., 10-21-75, at pp. 7-8.

Assuming the validity of these statements the problem remains that the issue of probable cause was never litigated and therefore the paucity of evidence in the record relating to the probable cause issue, understandable.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that this Court stay the issuance of the writ of habeas corpus and grant an evidentiary hearing on the merits.

Respectfully submitted,
WILLIAM J. SCOTT
Attorney General
State of Illinois

By: Raymond McKoski
Assistant Attorney General
188 W. Randolph St. (Suite 2200)
Chicago, Illinois 60601

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

(Title omitted in printing) .

ORDER

Before the court is the respondent's motion for a stay of the execution of a writ of habeas corpus pending an evidentiary hearing on the determinative issue of probable cause. The respondent asserts that the state trial record submitted to this court does not afford an opportunity for a complete examination of the crucial facts surrounding the arrest of the petitioner. The court notes that this argument was not raised by the respondent prior to the ruling in this cause. However, the court concludes that the request for an evidentiary hearing should not be denied solely because it is untimely. *Townsend v. Sain*, 372 US 293 (1963); *US ex rel McNair v. New Jersey*, 492 F2d 1307 (3rd Cir 1974). Accordingly the respondent's motion for stay of execution of writ is GRANTED pending an evidentiary hearing on the issue of probable cause.

Dated: December 8, 1975.

/s/ Joel M. Flaum
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

(Title omitted in printing)

ORDER

Evidentiary hearing in this matter set for January 5, 1976 at 10:30. Evidence and argument shall be specifically directed to the issue of probable cause to arrest.

Dated: December 12, 1975.

/s/ Joel M. Flaum
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

(Title omitted in printing)

PETITIONER'S MOTION TO VACATE ORDERS

Petitioner, by counsel, moves the Court to vacate its orders of December 8, 1975 and December 10, 1975, granting respondent's motion to stay issuance of the writ of habeas corpus, and setting this cause for an evidentiary hearing on January 5, 1975. In the alternative, petitioner requests that the Court order his enlargement from custody, pending disposition of proceedings in this cause.

As set out in the attached memorandum, the court no longer has jurisdiction to alter or amend its final order of October 21, 1975, and the orders whose vacature is sought are void orders.

Respectfully submitted,
/s/ Kenneth N. Flaxman
One of the attorney for petitioner

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

(Title omitted in printing)

TRANSCRIPT OF PROCEEDINGS

had at the hearing of the above-entitled cause before the HON. JOEL M. FLAUM, Judge of said Court, in his Courtroom, United States Courthouse, 219 South Dearborn Street, Chicago, Illinois, on Wednesday, the 7th day of January, A.D., 1976, at 11:00 o'clock a.m.

[2] THE CLERK: 75 C 69, United States of America, ex rel Ben Earl Browder versus Director, Department of Corrections, State of Illinois.

Hearing on a petition for writ of habeas corpus.

MR. FLAXMAN: Kenneth Flaxman on behalf of the petitioner.

MR. McKOSKI: Raymond McKoski for the defendant.

. . .

[4] MR. FLAXMAN: In addition there has been some question between us as to who has the burden of going forward in the hearing.

It is our position that there has already been a hearing, when the State Court record was filed and memoranda were filed. To resolve that problem we would like to offer, or re-offer into evidence the State Court record, and then rest our case at this point.

THE COURT: All right.

MR. McKOSKI: If I understand your Honor, Mr. Flaxman is assuming he has the burden of proof and in fulfilling that burden now he is offering the exhibit, if I understand it. It that correct?

MR. FLAXMAN: I am re-offering the exhibit.

THE COURT: All right, the re-offer of the State Court transcript will be accepted.

. . .

[5] MR. McKOSKI: I understand the petitioner has rested his case?

THE COURT: That is the statement.

MR. McKOSKI: At this time I move for a directed verdict with a finding in favor of the respondent and against the petitioner, on the basis, the trial transcript which he has introduced as Exhibit 1 has absolutely nothing to do with whether or not there was probable cause. Nothing in that—let me put it this way: Petitioner's Exhibit 1 is made up of the transcript of the trial, State trial of the petitioner and a motion to suppress. At neither of those hearings, hearing or trial, was the issue of probable cause raised, or was there any evidence at all offered on that issue.

The sole petitioner's case that he has presented here is a transcript that has nothing to do with the issue that is before the Court.

The transcript, as far as it relates to probable cause relates zero, because the issue was never raised. Therefore the petitioner has not fulfilled his burden of proving his allegation which was that the arrest [6] was without probable cause by a preponderance of the evidence or any evidence for that matter, because evidence has been introduced on the allegation.

MR. FLAXMAN: I think, your Honor, it has already been stated in the memorandum and I have nothing further to add.

THE COURT: The motion at this point will be denied.

(Thereupon the respondent presented the following case, to-wit:)

MR. McKOSKI: Your Honor, for our first witness we would call Jim Newson.

DIRECT EXAMINATION

By MR. McKOSKI:

Q. Mr. Newson, will you state your full name, please?

A. Jim Newson, N-e-w-s-o-n.

[7] Q. And could you tell us what your occupation is?

A. I'm a patrolman for the City of Chicago.

Q. You are on the Chicago Police Force, is that correct?

A. Correct.

Q. Could you tell us what your present assignment is?

A. I am presently assigned to 11th and State as a beat patrolman.

Q. On January 29, 1971 could you tell us what your assignment was on that date?

A. I was assigned to Beat 1129.

* * *

Q. On that same day, Mr. Newson, January 29, 1971, did you receive an assignment to interview a Sharon Alexander?

A. I did, sir.

[8] Q. Was anyone assigned with you?

A. Yes, sir.

Q. Could you state the name, please?

A. Officer Haladchuk, H-a-l-a-d-c-h-u-k.

Q. Where was he employed?

A. As a patrolman with the City of Chicago Police Department.

Q. After you received this assignment where did you proceed?

A. To 3906 West Van Buren.

Q. Is that in the City of Chicago?

A. In the City of Chicago, yes.

Q. Do you recall the approximate time that you went to this address?

A. At approximately 8:05.

Q. When you arrived there could you describe the premises that were at that address?

A. Yes, it was a two-flat apartment building.

Q. What did you do when you arrived there?

A. I interviewed one Sharon Alexander.

Q. Was anyone else present when you interviewed her?

A. Her mother, Annette Alexander.

Q. Anyone else besides those two people and your partner?

A. My partner and myself.

[9] Q. Did you have a conversation with Sharon Alexander at that time?

A. I did, sir.

Q. Could you relate please what you said to her and what she said to you at that conversation?

A. She was asked to tell us what happened and she proceeded to say that while walking eastbound on Van Buren about 3922 she was approached by two black males, one of which placed his hand over her mouth and told her to give him her money, to give her money to them.

She was subsequently forced into the entrance of a basement where she was sexually attacked.

Q. Did she mention anything about the location of the basement?

A. No, just the basement apartment.

Q. She mentioned the date that this took place?

A. It was on that date, the 29th of January, 1971.

Q. Did you have any further conversation with her at that time?

A. Yes, I asked her if she could describe them.

They were two black males, one light-complected and one dark-complected, both wearing brown jackets and in their late teens.

Q. Sharon Alexander gave you that information, is that correct?

[10] A. That's correct.

* * *

Q. Mr. Newson, do you recall any further conversation at that time with Sharon Alexander, at that time, or her mother?

A. None that I recall, no.

Q. After the conversation what did you do?

A. Took her to the Cook County Hospital.

Q. Took who?

A. I took Sharon Alexander and her mother, Annette.

Q. And where did you take them?

A. To Cook County Hospital.

Q. You left both of them there, is that right?

A. I did, sir.

Q. After your interview with Sharon Alexander did you have occasion to prepare any reports?

A. I did, sir.

Q. I would like now to hand you what has been marked Respondent's Exhibit 1 for identification, a document which consists of two pages, and ask you if you recognize that document?

A. I do, sir.

[11] Q. Could you tell me what it is?

A. City of Chicago Police Department Police Report.

Q. Who is it filled out by?

A. Myself.

Q. Is that your handwriting that appears on both pages?

A. It is, sir.

Q. And when did you fill it out?

A. January 29, 1971.

Q. Where did you receive the information that you included in the report?

A. From the victim, Sharon Alexander.

Q. On what day?

A. The 29th of January, 1971.

Q. That is a copy of your report, is that right?

A. Right.

Q. And does it accurately reflect the information that Sharon Alexander gave you?

A. Yes, it does.

Q. After you prepared that report, the original of that report, what did you do with it?

A. I handed it to a supervising sergeant.

Q. Where at?

A. At the police station.

Q. Where was that located?

[12] A. Located at the time at 4001 West Fillmore.

Q. Thank you.

MR. MCKOSKI: Your Honor, no further questions.

CROSS-EXAMINATION

* * *

By MR. FLAXMAN:

Q. Respondent's Exhibit 1 is the report that you filled out after your interview with Sharon Alexander, is that correct?

A. That's correct.

Q. And in that report you put down everything that she had told you, is that correct?

A. Basically, yes.

* * *

[13] Q. Sharon Alexander did not tell you anything other than what you have related in Court today, is that correct?

A. Basically, yes.

Q. Okay. Now when you interviewed Miss Alexander you asked her to tell you about how tall the offenders were, isn't that correct?

A. No.

Q. You asked her the weight, approximate weight of the offenders?

A. No.

Q. But you did ask her to describe the offenders?

A. Yes.

Q. And she told you that one offender—both offenders were male Negroes, both wearing brown jackets, both in their late teens, one had a dark complexion and one had a light complexion, is that correct?

A. That's correct.

Q. She didn't tell you anything else?

A. No.

Q. And you didn't ask her about how tall either of the offenders were?

[14] MR. McKOSKI: Objection, your Honor; that has already been asked.

THE COURT: I will permit the question.

By MR. FLAXMAN:

Q. And you didn't ask her about how tall either of the offenders were?

A. I asked her to describe them and the whole works.

Q. And she gave the descriptions I just read to you, and you asked her no further questions as to any description of the two offenders?

A. No.

Q. I'm not sure. The question was—you asked her no further questions to narrow the descriptions of the two offenders, is that correct?

A. That's correct.

Q. She didn't say she knew either of the attackers, did she?

A. She said she might possibly know them.

Q. So you are not—all right, did she tell you anything else?

A. Not that I can recall.

Q. You didn't pursue that question, when she said she might possibly know one of the offenders, is that correct?

A. No, I did not pursue it.

[15] Q. You did not write that down in your report, did you?

A. No.

MR. FLAXMAN: I have no further questions.

(Witness excused.)

MR. McKOSKI: Your Honor, respondent will next call Stan Thomas.

* * *

DIRECT EXAMINATION

By MR. McKOSKI:

Q. Mr. Thomas, spell your last name, please?

A. Stan, S-t-a-n, Thomas, T-h-o-m-a-s.

Q. And your occupation, Mr. Thomas?

A. Police officer assigned to the City of Chicago Area 4 Homicide as an Investigator.

Q. How long have you been assigned there?

A. I am in my seventh year now.

Q. On January 29, 1971 was that your same assignment?

A. Yes, sir.

[16] Q. On January 29, 1971 did you receive an assignment to interview a Sharon Alexander?

A. Yes, sir.

Q. Was anybody assigned along with you?

A. I don't recall at this point whether there was anybody with me at that time or not.

Q. After you received your assignment where did you go to?

A. I proceeded to the Cook County Hospital.

Q. In Chicago?

A. Yes, sir.

Q. Do you recall, if you recall what time was it, approximately?

A. Approximately 9:30 p.m. at night.

Q. Did you see Sharon Alexander when you arrived there?

A. Yes, sir.

Q. Where was she at?

A. She was in the examination area of the Cook County Hospital.

Q. Was anyone there with her when you arrived?

A. Yes, sir, her mother.

Q. Do you recall her mother's name?

A. Annette, I believe.

Q. At that time and place did you have a conversation [17] with Sharon Alexander?

A. Yes, sir.

Q. Was there anybody else present besides the people you have already listed?

A. No, sir.

Q. Would you tell us please what you said to Sharon Alexander and what Sharon Alexander said to you?

A. Well, I identified myself to her as a police officer assigned to make the investigation of her complaint, and I identified myself to her mother who was present during the course of this interview.

I had asked her at this point would she relate to me what had occurred to her.

Q. What did she say?

A. At this point—she was emotionally disturbed at this point, but she became a little relaxed after a few minutes and she related to me that she had been shopping in the area of Madison and Pulaski and she had been on her way home, that she was on Pulaski Road, southbound, towards her home when she was approached by two male Negroes, one who she knew to be a Browder, and she knew the sister of this person.

Q. When you say "knew him as a Browder" do you mean his name?

A. She described him as Browder, his last name being [18] Browder. She knew the sister, that the sister lived and the brothers lived in the 4000 block of Monroe, and that the second man with this person was unknown to her, a male Negro about seventeen who was lighter in complexion.

That she was approached by these two persons and the one that was unknown to her had asked her for her money, and when she refused she was slapped in the face by the unknown male Negro.

That these two subjects then fled from the scene.

Q. Did she relate anything further?

A. She continued on her way home and she got to Van Buren Street, which is the street she lives on, and she proceeded to go eastbound and at approximately 3922 West Van Buren Street she was approached by the same two subjects, Browder and this unknown male Negro, light-complected, and dragged into the gangway, to the rear of the gangway at 3922 West Van Buren.

At this point her money was taken from her, I believe it was \$3.00, and she was knocked to the ground and that this Browder subject then forced her to have sexual rela-

tionships, relationship with her, and after he completed the act that the unknown male Negro forced her to have sexual relationships.

When they were both finished the subject [19] Browder, who was armed with a gun, threatened her that if she told anyone he would kill her, and that these two subjects then fled through the alley.

She at this time picked herself up off the ground and ran to her house, which was 3904 West Van Buren Street.

Q. In Chicago?

A. In Chicago, yes, sir.

She related what occurred to her to her mother, who in turn called the police who arrived to take the report.

Q. Did you ask Sharon Alexander how old she was?

A. Sharon Alexander was 15 years of age at the time.

Q. Do you recall that you had further conversation with Sharon Alexander at the hospital, other than what you have already related?

A. Mainly it dealt with the fact of whether or not she would be able to identify the subject, where I could get ahold of her if the subject was apprehended.

Just pertinent information with regard to her accessibility in the course of this investigation.

Q. Besides that was there any further conversation if you recall?

A. Not that I recall at this time.

Q. After you talked with Sharon Alexander, [20] subsequent to that time, did you have occasion to have a conversation with a Martin Conroy?

A. Yes.

Q. Do you know Martin Conroy?

A. Yes, sir.

Q. Do you know where he is employed?

A. Martin Conroy is a police officer assigned as a Youth Officer. At the time in 1971 we were in the same station, and he was assigned to the Youth Division Section of Maxwell Street.

Q. Do you recall the date that you had the conversation with him?

A. It was, I believe, the 31st of January, 1971.

Q. Do you have any recollection as to the time?

A. No. It was sometime prior to our roll call, which would be sometime prior to 4:00 o'clock in the afternoon.

Q. Where did you see him at?

A. At the Maxwell Street Unit.

Q. And you had a conversation with him at that time?

A. Yes, sir.

Q. Do you recall if there was anyone else present besides you and Mr. Conroy?

A. I believe there was another officer present there.

There was various other officers right in [21] that area, but I don't recall if his partner was there at the time or not.

I had gone to Officer Conroy because of the——

MR. FLAXMAN: I object to the answer going beyond what was asked in the question, and I ask that the witness be instructed to confine his responses to the question.

THE COURT: Well all witnesses should confine themselves in responses to the questions asked, but I will permit the answer to stand in this case.

By MR. McKOSKI:

Q. Mr. Thomas, just so there is no confusion, do you recall the name of any other person who was present at this conversation?

A. Not at this time.

Q. Could you please relate—well first let me ask you what did the conversation concern that you had with Mr. Conroy?

A. I had gone to Officer Conroy to explain to him the fact I had a rape case and that I had the—in the course of my interview with the victim she related to me that one of the subjects was a Browder, about 17 years of age, who lived in the 4000 block of West Monroe Street, and I went there to enlist the aid of Officer Conroy in possibly locating the suspect.

[22] Q. Could you tell us to the best of your recollection what you told Mr. Conroy at that time?

A. Well, I told him about the rape and the fact that this 15-year-old girl had been raped.

Q. Did you mention her name?

A. I don't recall at this point whether or not I did.

Q. Okay, go ahead.

A. And I related to him that one of the subjects was a male Negro about 17 by the name of Browder who lived in the 4000 block of West Monroe.

That the second subject was a male Negro, 17 years of age, lighter—light-complected and unknown to the victim.

I asked him if there was anything that he could come up with in regard to this investigation.

Q. What did he say?

A. He related something to the effect that he knew something of a Browder family living in the 4000 block of West Monroe Street, and that he would attempt to make an investigation and locate any of the Browder children.

Q. Did you give Mr. Conroy at this time any more information concerning the rape of Sharon Alexander that you recall?

A. I don't recall at this point.

MR. McKOSKI: No further questions, your Honor.

[23] THE COURT: Mr. Flaxman.

CROSS-EXAMINATION

By MR. FLAXMAN:

Q. How long have you been a police officer?

A. I am in my thirteenth year right now.

Q. So in 1971 you were in your eighth year, is that correct?

A. Eighth or ninth year, yes.

Q. And what was your rank at that time?

A. Investigator.

Q. How long had you been an Investigator?

A. Since 1969.

Q. Did you get any training before you became an investigator with respect to interviewing witnesses?

A. I had a 30-day training period when I left patrol and prior to becoming a detective.

Q. And one of the things you learned in that 30-day period was that when you interviewed a person after a crime you try to get a description of the offender?

MR. McKOSKI: Your Honor, I am going to object to this. I can't see any relevance of what this witness learned. It is what he did that is important.

THE COURT: I will permit the question.

MR. FLAXMAN: Thank you.

[24] By THE WITNESS:

A. Yes.

By MR. FLAXMAN:

Q. You testified on January 29, 1971 that you had a con-

versation with Sharon Alexander at the Cook County Hospital?

A. Yes.

Q. Sometime after that conversation you prepared a report setting out the substance of that conversation, is that correct?

A. Yes.

Q. Do you recall when you prepared that report?

A. I believe it was the first of February, 1971.

Q. So it was a few days after the conversation?

A. Yes, sir.

Q. And prior to testifying here in Court today you had a conversation to look over that report, isn't that correct?

A. Yes, sir.

Q. And everything that Sharon Alexander told you in that conversation with her was put down in the report, is that correct?

A. To the best of my recollection it is.

Q. And you have related to us in Court everything that Sharon Alexander said to you in that conversation, [25] is that also correct, sir?

A. As far as I can recall.

Q. Isn't it true that she didn't give you an approximate height and weight of the two offenders?

A. I don't recall if she had or she had not.

Q. You asked her about how tall the offenders were, didn't you?

A. I would have, I probably would have, yes.

. . .

Q. You asked her about how—the approximate weight of the offenders, is that correct?

A. I would have.

. . .

[26] Q. In other cases when you interview witnesses you ask them the approximate height and weight of the offenders, is that correct?

A. It would—yes, I do ask that question, yes.

Q. And when they tell you what the approximate height and weight is you incorporate that into your report?

A. Not in all cases.

Q. In which cases don't you incorporate that into your report?

A. It would depend on whether or not after I have interviewed them and the subject is taken into custody, I would not go into a detailed description of that, because the subject is in custody.

If the subject was not in custody and wanted, then I would go into a detailed description.

[27] Q. On January 31 you had a conversation with Mr. Conroy, is that correct?

A. Yes, sir.

Q. And you related to him the substance of your conversation with Sharon Alexander on January 29?

A. Yes, sir.

Q. And Officer Conroy was the first other police officer that you had involved in this investigation, is that correct?

A. Yes, sir.

Q. Let's see, your testimony is that for two days you had the name of an offender and you did not act on it?

A. Will you repeat the question, please?

Q. All right, you got the name of a possible offender as being Browder in the 4000 block of West Monroe Street on January 29, is that correct?

A. Yes, sir.

Q. And the first action you took upon that information was on January 31?

A. On January 31 I had gone to seek the help of Officer Conroy.

Q. Officer Conroy was familiar with that neighborhood and with youth in that neighborhood, is that correct?

A. Yes.

Q. And you were not familiar with youth in that [28] neighborhood?

A. No, sir.

Q. Excuse me?

A. No, sir.

Q. So you waited two days to go to Officer Conroy for help?

A. No.

MR. McKOSKI: Objection, your Honor. It has been asked and answered already.

THE COURT: I will permit the question and the answer to stand.

MR. FLAXMAN: Thank you.

. . .

[29] Q. In your conversation with Officer Conroy on January 31 did you tell him the approximate height and weight of the two offenders described by Sharon Alexander?

A. I cannot recall if I did or didn't.

Q. Can you recall anything about the case that isn't in your reports?

A. That happened in 1971, and I can't recall the aspects of that investigation today.

. . .

Q. I would like to show you a document which has been marked as Petitioner's Exhibit 2 for identification, and I ask you to look at it, Officer.

A. This is my report.

Q. That is the report that you referred to previously as having been completed by you on about [30] February 1, 1971?

A. Yes, sir.

Q. And is this one of the reports that you examined prior to testifying here in Court today?

A. Yes, sir.

Q. Do you recall the first time that you had occasion to reexamine this report with respect to testifying in this cause?

A. It might have been about a month-and-a-half ago.

. . .

Q. After rereading this report your recollection was refreshed about the events that you have testified about in Court here today, is that correct?

A. Yes, sir.

Q. And isn't it true that the only facts that you recall were those contained in the report?

A. Not all, but it did refresh my memory.

Q. But you cannot recall what Sharon Alexander [31] said to you when you asked her the approximate height and weight of the offenders?

MR. McKOSKI: Objection, your Honor. It has been asked twice already.

THE COURT: I will sustain the objection.

MR. FLAXMAN: Just one further question:

By MR. FLAXMAN:

Q. This report was prepared after Mr. Browder had been arrested, is that correct?

A. Yes, sir.

. . .

REDIRECT EXAMINATION

By MR. McKOSKI:

Q. Mr. Thomas, I would like to hand you again [32] Petitioner's Exhibit 2 for identification which you have already identified as your report, is that correct?

A. Yes, sir.

Q. After looking at that report can you tell us now for sure, for certain, what date you prepared that report? I think you testified on direct examination it was about February 1.

A. It was exactly February 1, sir.

Q. And do you know what date the petitioner was arrested, taken into custody?

A. The 31st of January, 1971.

Q. So your report was prepared after he was arrested, is that correct?

A. Yes, sir.

Q. Your report was also prepared after the petitioner, Browder, had been identified by two witnesses, is that correct?

A. Yes, sir.

Q. So as a result you may have obtained the height, weight, other facts from Sharon Alexander and not included them in your report, because they weren't necessary, is that right? The man had already been identified?

MR. FLAXMAN: Objection, your Honor.

THE COURT: Sustained.

MR. McKOSKI: I have no further questions, your Honor.

. . .

[33] MR. McKOSKI: Your Honor, we will next call Martin Conroy.

MARTIN CONROY,

DIRECT EXAMINATION

By Mr. McKOSKI:

Q. Mr. Conroy, could you state your full name and spell your last name, please?

A. Youth Officer Martin Conroy, C-o-n-r-o-y.

Q. What is your occupation?

A. Juvenile Officer with the Chicago Police Department.

Q. How long have you been employed there?

A. I am in my tenth year.

Q. What is your present assignment?

A. Area 3 Youth.

Q. On January 31, 1971 what was your assignment then?

A. Youth Officer in Area 4.

[34] Q. That same day, Mr. Conroy, January 31, 1971, did you have occasion to have a conversation with a Stan Thomas concerning a rape?

A. Yes, sir, I did.

Q. Would you tell us where that conversation took place?

A. In the Area 4 Headquarters.

Q. Where is that located?

A. Maxwell and Morgan.

Q. In Chicago?

A. Yes, sir.

Q. If you recall what was the approximate time of the conversation?

A. I think it was about 4:30 in the afternoon.

Q. Was there anyone present that you recall besides yourself and Mr. Thomas?

A. I don't recall, sir.

Q. Will you please relate to us what you said to Mr. Thomas at that time and what he said to you?

A. Investigator Thomas told me that he had a rape that occurred on the 29th with a Sharon Alexander as a victim, and that she had the name of a Browder as the offender.

I asked him if he had a copy of the case report so I could look it over and I obtained a copy of the case [35] report.

Q. I should ask you too, do you know where Mr. Thomas, Stan Thomas, is employed?

A. He was an Investigator for Homicide with the Chicago Police Department.

Q. Mr. Conroy, you mentioned obtaining a police report.

I would like to show you now Respondent's Exhibit No. 1 for identification and ask you if you recognize that document?

A. Yes, sir.

Q. Could you tell us what it is?

A. It is a Crime versus Person Case Report, rape. The person, Sharon Alexander.

Q. Is that the report you retrieved?

A. Yes.

Q. Where did you get it from?

A. The files in Area 4.

Q. Respondent's Exhibit No. 1 for identification, is that the very same report that you withdrew from the records?

A. Yes, sir, it is.

Q. Now going back just a second to the conversation you had with Mr. Thomas at the Police Station, do you recall anything further that was said in that conversation?

A. The offender's name was Browder and he was a male Negro in his teens.

[36] Q. Do you recall any other conversation with him at that time?

A. I don't recall what was said, but we had some other words.

Q. After the conversation with Mr. Thomas did you do anything in connection with the name Browder that he had given you?

A. Yes, sir.

Q. What? Could you describe what exactly you did?

A. I went to the 11th District, the Fillmore Station at 4001 West Fillmore and I checked the Youth Files and came up with the name Browder and address of 4053 West Monroe, and the first name Tyrone, a 16-year-old male Negro.

Q. And again—I'm sorry.

A. I also had a phone number for that address.

Q. Could you tell us again, I'm not really clear on it, where or what type of files it was exactly that you obtained this Tyrone Browder's name?

A. Youth Division Headquarters files.

Q. Where is that located?

A. That's at 11th and State.

Q. What day was this?

A. It was on the 31st.

Q. After you obtained the name Tyrone Browder what did you do next if anything in regard to this investigation?

[37] A. I contacted the victim and spoke with her.

Q. Who was that?

A. Sharon Alexander.

Q. How did you contact her?

A. I went to her house.

Q. Do you recall where her house was, the general vicinity?

A. It was in the 3900 block of Van Buren, I think.

Q. Do you recall the time that you went over there?

A. Sometime between 4:30 when I found out about it and 5:00 o'clock, I don't know exactly.

Q. Did you go to her home with anyone else or by yourself?

A. I went with my partner, Frank O'Driscoll.

Q. Would you spell the last name?

A. O'-D-r-i-s-c-o-l-l.

Q. When you arrived at Sharon Alexander's residence what did you do?

A. I spoke with the victim and asked her what happened.

Q. What did she tell you?

A. She told me that she was raped by a boy known to her as Browder, and she knew this boy to be a Browder, because she said she went to school with a sister of his and that they lived in the 4000 block of West Monroe.

[38] Q. In Chicago?

A. Yes, sir.

Q. I should ask too, was her mother or anyone else present at this time?

A. Yes, sir, her mother was present.

Q. Do you know her first name?

A. No, sir, not offhand.

Q. Was there further conversation with Sharon Alexander at that time?

A. I asked her if she could identify him if I found him, and she said yes.

Q. Was there any discussion with regard to the other assailant that you recall?

A. No, sir, I don't recall.

Q. Do you recall anything else in that conversation?

A. No, sir.

Q. After you left Sharon Alexander's home what did you do next?

Strike that.

I want to ask and make sure, what was the date that you interviewed Sharon Alexander?

A. On the 31st of January, 1971.

Q. Okay, what did you do next in the investigation?

A. Went to the 3900 block of Adams. There was a fellow known to us there by the name of Little Man.

[39] Q. Was that his real name?

A. No, sir, that was his nickname.

Q. Do you know his real name?

A. No, sir, I do not.

Q. Do you know where he's at now?

A. I heard since that he was killed.

Q. Okay. What did you do then?

A. Well, my partner and I spoke to this fellow at the squad car and we asked him if he knew the name or the family Browder, and he said yes he did.

I asked him if he knew where he lived, and he said yes.

I asked him if he wouldn't point out the house, and he said he would. He accompanied us to 4053 West Monroe and pointed out the house.

Q. Did you have any other conversation with this person that you recall?

A. No, I can't recall anything more.

Q. What did you do next?

A. I went to the 11th District and contacted an assist car, Officers Toohey and Ahern, and we filled them in on the situation.

Q. And this was still the same day, January 31?

A. Yes, sir.

Q. All right. After talking with Officers Toohey [40] and Ahern what did you do next?

A. Proceed to 4053 West Monroe.

Q. Between the time you talked to Toohey and Ahern at the station and went to the home did you perform any other investigation between that time?

A. Yes, sir.

Q. What?

A. With the record check I called and spoke to a woman that said she was Tyrone Browder's mother.

Q. You called the number on the card, is that correct?

A. Yes, sir.

Q. When you called what happened?

A. I told her I was a Youth Officer investigating an

assault, and the girl said it was a teen-aged boy by the name of Browder and I had the name Tyrone on the record.

The mother responded if it was an assault on a girl it wouldn't be Tyrone, it would be Ben Earl, her other son.

I asked her if either or both of those boys were home, and she said they were both present.

I asked her if she would keep them home so I could come and talk with them.

Q. Who did you talk with over the phone?

A. Lucille Browder, the mother.

Q. Whose mother?

[41] A. The mother of Tyrone and Ben Earl.

Q. Was there further conversation over the phone with Lucille Browder?

A. I don't recall.

Q. Okay. After you talked to her then what happened?

A. Then we proceeded to 4053 West Monroe.

Q. And that was the same day, January 31, 1971?

A. Yes, sir, about 6:00 in the evening we got to the house.

Q. Who went to the house all together?

A. Myself, O'Driscoll, Toohey and Ahern.

Q. All police officers?

A. Yes, sir.

Q. Were you in uniform or plain clothes?

A. Civilian dress.

Q. That goes for all four officers?

A. Yes.

Q. When you arrived at the house what happened then?

A. I spoke to the mother and told her I was the officer that talked to her on the phone.

She invited us into the house, and indicated that Tyrone was there and Ben Earl was there, along with two other teen-aged boys.

Q. Do you know the names of the other teen-agers who were there?

[42] A. Not offhand. I could look at a report and remember. I think there was a Dale.

Q. Right now you don't recall the names of the other two black males?

A. No, sir.

Q. Could you describe the person who was introduced to you as Ben Earl Browder? How did he look at that time?

A. He was a male Negro, about 17 or 18, dark-complected.

Q. All right, what happened next inside the house?

A. I restated to the mother and to those present that I was investigating a rape and the investigation showed that it was a Browder, a teen-ager, and the girl could identify him.

Tyrone denied knowledge of it, and Ben Earl denied knowledge of it.

I told them they would have to go to the station and "see if the girl can recognize or identify you."

I suggested to the others present, they were about the same age and height, that if they came along it is possible that the victim wouldn't identify anyone, because there would be so many. I suggested if I brought one she would maybe point out one, and the other two fellows agreed to come along.

Q. What happened after that?

[43] A. Well—

Q. Was there further conversation in the house?

A. Before we left I said that "It's possible one of you will be identified, because there is supposed to be a second guy involved, besides a Browder," and I informed them of their Constitutional rights.

Q. Was there any further conversation that you recall at the house at that time?

A. Not that I can recall.

Q. What did you do next?

A. We proceeded to the 11th District.

Q. With who?

A. With Tyrone, Ben Earl and the other two.

Q. The other two male Negroes in the house?

A. Yes, sir. They were teen-agers. There were others present, but only four teen-agers.

Q. And at that time when you left with Ben Earl Browder and Tyrone Browder from their house they were under arrest, is that right?

A. Yes, sir.

Q. That same day, January 31, 1971 were you present when a line-up was conducted involving Ben Earl Browder?

MR. FLAXMAN: Objection to this, your Honor, as being beyond the scope of what the hearing is limited to, just probable cause.

[44] THE COURT: Mr. McKoski, where are you going with this?

MR. McKOSKI: It is serving two purposes: Number one, I don't believe it is outside the scope of the hearing, because an argument can be made that even if there is no probable cause for an arrest when they were arrested the identification constituted probable cause.

Secondly, I think it is necessary for a logical progress of the evidence, what exactly happened.

THE COURT: All right, I will permit it.

MR. McKOSKI: I will withdraw the question.

By MR. McKOSKI:

Q. Mr. Conroy, were you present when a line-up was conducted where Ben Earl Browder participated?

A. Yes, sir.

Q. Where was that line-up conducted?

A. At the 11th District.

Q. On what day?

A. On the 31st.

Q. Do you remember about what time?

A. Sometime after the arrest, sometime after 6:00 o'clock in the evening.

Q. Do you recall the time any more specifically? [45] Can you narrow it down any more than that?

A. About 7:00 o'clock. I don't remember though, exactly.

Q. Could you describe—first of all how many people participated in the line-up?

A. There were five that stood in line.

Q. Could you describe them generally?

A. Male Negroes in their teens, five foot seven to about five foot eleven.

Q. Do you know the names of any of the persons that stood in the line-up?

A. Tyrone Browder, Ben Earl Browder, Dale I think.

. . .
(Colloquy omitted)
. . .

[50] Q. Mr. Conroy, do you specifically recall the names of the other participants in the line-up besides the two Browders?

A. No, I do not.

Q. You testified there were five participants altogether, is that correct?

A. Yes.

Q. You viewed this line-up, is that correct?

A. Yes, I did.

Q. Were any persons brought into the police station and viewed the line-up?

A. Yes.

Q. Would you tell us their names?

A. Sharon Alexander was brought in.

Q. And who else?

A. A Johnson, Johnnie Mae Johnson.

Q. Did they view the line-up separately or together?

A. Separately.

Q. Did Sharon Alexander identify anyone in the line-up as the person who raped her?

A. Yes.

Q. Who did she identify?

A. Ben Earl Browder.

[51] Q. Did Johnnie Mae Johnson make any kind of identification concerning a rape involving her?

A. Yes, she did.

Q. Who did she identify?

A. Ben Earl Browder.

MR. McKOSKI: Your Honor, I have no other questions.

At this point I would offer into evidence Respondent's Exhibit 1 for identification.

MR. FLAXMAN: No objection.

THE COURT: It may be received.

(Respondent's Exhibit 1 for identification was received in evidence.)

MR. McKOSKI: I have no other questions, your Honor.

. . .

CROSS-EXAMINATION

By MR. FLAXMAN:

Q. After you arrested Mr. Browder, did you fill out a report?

A. (No response.)

Q. Do you understand the question?

A. Yes, I did. I think my partner did the actual typing out of the reports.

[52] Q. Did he consult with you on the information that was placed in that report?

A. Yes, sir.

Q. Did you look over that report when he completed it?

A. Yes, sir.

Q. And were all the facts that were stated in that report true?

A. Yes, sir.

Q. You testified that you interviewed Sharon Alexander and she advised you that she knew the name of one of her offenders as Browder, is that correct?

A. Yes, sir.

Q. And then, after you interviewed her you went back to the police station?

A. Yes, I think directly after interviewing her we went to find this Little Man.

Q. And later that night you arrested some people named Browder?

A. Yes, sir.

Q. And you arrested them to allow Sharon Alexander to view them?

MR. McKOSKI: I will object to that, your Honor. The purpose for the arrest I cannot see as relevant at all.

MR. FLAXMAN: That goes to the exploitation of [53] the primary taint, to the conduct.

THE COURT: I will permit the officer to give his reason for the arrest.

THE WITNESS: Would you please repeat the question?

MR. FLAXMAN: Let me rephrase it:

By MR. FLAXMAN:

Q. When you went to the Browder residence that night you went there to arrest someone named Browder, is that correct?

A. A teen-aged Browder, like 15, 16, 17, 18.

Q. And what was the purpose of arresting the teen-aged Browder?

A. Because the victim, Sharon Alexander, had told me it was a teen-ager older than her, like 16, 17, 18, like that, and it was a Browder that lived on Monroe.

Q. And what was the purpose of making that arrest and taking the Browder into custody?

A. For rape.

Q. Well, was the purpose to bring him to the police station to allow him to be viewed by Miss Alexander?

MR. McKOSKI: Your Honor, I am going to object again. The witness has now already stated the reason for the arrest.

THE COURT: He has stated a reason. If he has an [54] additional reason he may give it, but the reason has been stated. If he has another reason he may so state.

By MR. FLAXMAN:

Q. At the time you went to the Browder house you were investigating the rape of Sharon Alexander?

A. Yes.

Q. And in part of that investigation you wanted to determine which if any Browder had been involved in the offense, is that correct?

A. Yes, sir.

Q. And when you went to the Browder residence you spoke to two teen-aged brothers?

A. Yes, sir.

Q. And both of them told you that they had had nothing to do with the events in question?

A. Yes, sir.

Q. Okay. What did you do then?

A. I informed them that the victim had said that a teen-aged Browder had raped her and she could recognize the guy that did it.

Q. And then you arrested them and took them down so that they could be identified if possible?

A. Yes, sir.

Q. So that the purpose of your arrest was to bring [55] them to the police station so they could be placed in a line-up?

MR. McKOSKI: I am going to object to this again, your Honor.

THE COURT: No, I am going to permit the question.

By MR. FLAXMAN:

Q. Shall I repeat the question?

A. Would you, please?

Q. All right: Isn't it true, sir, that the purpose behind

your arrest of the teen-aged Browders was to bring them down to the station to place them in a line-up?

A. To see if they could be identified by the victim. To see which one would be identified, yes, sir.

Q. At the time you arrested both Browders you didn't know which one, if either, would be the one who would be identified?

A. That is correct, sir.

Q. I would like you to look at a document marked Petitioner's Exhibit 3 and tell me what it purports to be?

A. This is a copy of a report, a supplemental report on the rape of Sharon Alexander.

Q. Was that the report that was prepared by your partner that you looked over and adopted as being true?

A. Yes, sir.

Q. Excuse me?

[56] A. Yes, sir.

MR. FLAXMAN: Thank you, I have no further questions, your Honor.

* * *

THE COURT: All right.

MR. FLAXMAN: Has that motion been denied?

THE COURT: The motion is taken under advisement.

MR. FLAXMAN: I have two exhibits that were marked which are two police reports. I believe this is a stipulation as to the genuineness of the documents.

MR. McKOSKI: You are referring to Petitioner's Nos. 2 and 3?

MR. FLAXMAN: Yes.

MR. McKOSKI: I have no objection to the authenticity of the documents or the foundation. I have objections as to relevancy and materiality.

MR. FLAXMAN: I move their admission into evidence.

[57] THE COURT: The Court will receive the exhibits into evidence. Do they carry numbers?

MR. FLAXMAN: Petitioner's Exhibits 2 and 3.

THE COURT: All right.

(Petitioner's Exhibits 2 and 3 were received in evidence.)

MR. McKOSKI: Your Honor has ruled, but I would like to

make a very brief argument of why I think they are immaterial and irrelevant.

THE COURT: All right?

MR. McKOSKI: The Petitioner's Exhibit 2 was prepared by Stan Thomas who testified here today. If there is something in Petitioner's Exhibit 2 that contradicted that testimony it should be brought out for impeachment.

This report on its own, I don't know if it contains contradictions or not, I don't think it does, but if it contains something that could be termed a contradiction it is improper, I would submit, for this Court to consider it because there has been no impeachment. Other than that the information, any information Stan Thomas had concerning this crime should have been brought out on the examination of him while he was here.

This report is like a hearsay document that has no proper reason that should be admitted. The witness didn't say he couldn't recall, this is certainly not past [58] recollection recorded or anything like that.

I really can't understand why this document, Petitioner's Exhibit 2, is being admitted. What purpose it will serve, it's a prior statement of a witness and I have the same objection to Petitioner's No. 3.

THE COURT: Mr. Flaxman?

MR. FLAXMAN: First I believe the officers testified, but the writings were used to refresh their recollection. Under 6-12 Rules of Evidence they are admissible.

The last officer testified that the writing was adopted by him, which I think makes it not hearsay under the Rules.

THE COURT: What is your position on relevance?

MR. FLAXMAN: Well, first relevancy isn't a question under 6-12, it's an absolute right to have it if it was used to refresh his recollection.

THE COURT: The Court will stand on the ruling that they may be admitted into evidence.

MR. FLAXMAN: We have two witnesses in rebuttal, your Honor.

THE COURT: All right.

(Whereupon the Petitioner presented the following evidence in rebuttal:)

[59] LUCILLE BROWDER,

DIRECT EXAMINATION:

By MR. FLAXMAN:

Q. Would you state your name, please?

A. Lucille Browder.

• • •

Q. Are you related to the petitioner, Ben Earl Browder?

A. I am Ben's mother.

Q. Directing your attention to January of 1971, do you recall the day on which your son, Ben Earl and your son Tyrone were arrested?

A. Yes.

Q. Were you at home when they were arrested?

A. I was at home.

Q. Do you recall if you had any conversations with the police officers who came to arrest your sons?

A. Yes. I remember the police asked me, said that they had come for my sons, and I said, "What for," and it [60] seems like to me they said to take him down for questioning and they would bring them back.

Q. Do you remember the names of the police officers?

A. No, I don't remember the names.

Q. Was anything further said by the police officers to you?

MR. McKOSKI: Your Honor, objection unless it is specified as to place.

By MR. FLAXMAN:

Q. During that same conversation was anything further said to you by either of the police officers?

A. No, I know I asked him what for, and they said they was going to take them down for questioning and they would bring them back.

Q. Did they say who they wanted to arrest?

A. No, they didn't say especially no names.

Q. Did they tell you the offense for which they were—

A. No, I tried to get it out of them.

I said, "What for?" They said "People want to interview them, want to see them," or something like that, and they were going to bring them back and let them go.

They didn't tell me specifically what they wanted them for down there.

[61] Q. Do you remember specifically they were told they were looking for Tyrone for the investigation of a rape?

A. I don't remember them calling Tyrone especially.

Q. Do you remember saying "It's probably not Tyrone, it sounds more like Ben"?

A. No, no.

MR. McKOSKI: Your Honor, I object unless we are talking about the same time and place.

By MR. FLAXMAN:

Q. During that conversation do you recall stating to either of the police officers that "It's probably not Tyrone who committed the crime, but Ben"?

A. No.

Q. Earlier that evening did you receive a phone call from a police officer?

A. No, I don't recall no phone call, really.

MR. FLAXMAN: Thank you, I have no further questions.

CROSS-EXAMINATION

By MR. McKOSKI:

Q. You have already testified you were Ben Earl Browder's mother, is that right?

A. Yes.

Q. And before your son, Ben Earl Browder went to [62] jail, went to prison, he lived with you, is that right?

A. Yes.

Q. He had lived with you about all his life?

A. Right.

Q. How long has he been in the penitentiary, do you know approximately?

• • •

A. I am thinking just about five years.

Q. And in your household you and the rest of your family have missed Ben Browder, haven't you?

A. Sure, because he's part of the family. We miss him.

Q. You would like to do anything you could to help him come back home?

A. Not anything. I would like to do something to help him, but not anything though.

[63] Q. Thank you very much.

Mrs. Browder, you said you didn't receive a phone call from any police on the evening that Ben Earl Browder was arrested, is that your testimony?

A. Yes.

Q. So you may have received a phone call or you may not have, is that right?

A. I don't remember receiving one. Maybe one came, but if it came for me they would have told me.

Q. I'm sorry, ma'am, I didn't hear?

A. I said if it had come for me the children would have told me. You know, if it came especially for me. I don't remember receiving one myself.

Q. What you are saying is you don't remember if you got a phone call or not that night?

A. No, no I don't remember.

MR. McKOSKI: Thank you. No further questions, your Honor.

(Witness excused.)

[64] TYRONE BROWDER,
DIRECT EXAMINATION

By MR. FLAXMAN:

Q. State your name, please?

A. Tyrone Browder.

Q. Are you related to the petitioner, Ben Earl Browder?

A. Yes.

Q. And how are you related to him?

A. I am his brother.

Q. Directing your attention to January 31, 1971, do you recall being arrested on that day?

A. Yes.

Q. And do you recall where you were when you were arrested?

A. At home.

Q. And your brother was arrested with you?

A. Yes.

[65] Q. Okay, in your opinion what is your complexion?

A. My complexion now?

Q. Yes?

A. Brown skin.

Q. Is it dark brown skin or light brown?

A. Dark.

[66] Q. About how tall are you now, Mr. Browder?

A. Six foot two.

Q. Do you recall about how tall you were in 1971?

A. About an inch shorter.

Q. That would make you about six foot one.

A. Yes.

Q. Do you know the height of your brother?

A. Now?

Q. Yes?

A. About six foot one.

[67] Q. Do you know how tall your brother was in 1971?

A. No, I don't.

Q. Do you know if you were taller than him in 1971?

A. Yes.

MR. FLAXMAN: We have nothing further, Judge.

THE COURT: All right.

MR. FLAXMAN: At this time it is our position that there has been no new evidence brought forth that was not before the Court before when it entered its opinion, and found that Mr. Browder was arrested unlawfully.

There is testimony that they went to the house to arrest the teen-ager named Browder, and there happened to be two teen-agers named Browder, so they arrested them both.

As a matter of law they didn't have [68] probable cause to arrest but one.

THE COURT: Mr. McKoski?

MR. McKOSKI: Your Honor, if it is my understanding that memoranda will be submitted, I will waive any kind of closing argument. I will present my closing argument in my memorandum if that's all right with the Court.

THE COURT: All right.

CRIME AGAINST PERSON CASE REPORT / CHARGES POLICE 600

1. OFFENSE: **RAPE** 2. CLASSIFICATION: **FELONY** 3. BEAT OR UNIT ASSIGNED: **1124** 4. BEAT OF OCCURRENCE: **1113**

5. ADDRESS OF OCCURRENCE: **3722 W. VAN BUREN** 6. DATE OF OCCURRENCE: **29 JAN 71** 7. TIME OF OCCURRENCE: **10:45** 8. DATE OF REPORTING: **30 JAN 71** 9. TIME OF REPORTING: **10:00**

10. VICTIM'S NAME: **ALEXANDER, SHARON E. FN 1936** 11. HOME ADDRESS: **3904 W. VAN BUREN** 12. HOME PHONE: **722-0047** 13. BUSINESS PHONE: **NONE**

14. PERSON REPORTING CRIME TO POLICE: **VICTIM** 15. HOME ADDRESS: **3904 W. VAN BUREN** 16. HOME PHONE: **722-0047** 17. BUSINESS PHONE: **NONE**

18. NAME OF GUARDIAN OF VICTIM IF MINOR: **ALEXANDER, ANNETTE** 19. HOME ADDRESS: **3904 W. VAN BUREN** 20. HOME PHONE: **722-0047** 21. BUSINESS PHONE: **NONE**

22. NAME OF PERSON WHO DISCOVERED BODY (MURDER): **PERSON** 23. HOME ADDRESS: **3904 W. VAN BUREN** 24. HOME PHONE: **722-0047** 25. BUSINESS PHONE: **NONE**

26. WITNESSES: **NONE AT THIS TIME** 27. HOME ADDRESS: **3904 W. VAN BUREN** 28. HOME PHONE: **722-0047** 29. BUSINESS PHONE: **NONE**

30. NAME OF FIRST OFFICER AT SCENE: **DNA** 31. TIME OFFICER ARRIVED: **DNA** 32. HOW OFFENDER APPROACHED - ENTRY - DIRECTION: **ON STREET FACE TO FACE**

33. VICTIM'S OCCUPATION: **SILVER** 34. EXACT LOCATION OF VICTIM ON PREMISES: **DNA**

35. TYPE OF LOCATION WHERE OCCURRED: **NE OTHER** 36. TYPE OF LOCATION: **STREET** 37. PARK: **NO** 38. RAILROAD: **NO** 39. CTA: **NO** 40. CTA: **NO** 41. TAVERN: **NO** 42. OTHER: **TO BAYVIEW**

39. WEAPON, INSTRUMENT OR MEANS OF ATTACK: **SEXUALLY** 40. HOW MEANS OF ATTACK USED: **DNA** 41. IF VICTIM HOSPITALIZED, STATE WHERE: **DNA**

42. NATURE OF INJURIES AND LOCATION ON BODY: **DNA**

43. WHAT DID OFFENDERS SAY: **GIVE ME YOUR MONEY** 44. NO. OF OFFENDERS: **2** 45. SEX: **M** 46. RACE: **N**

47. VEHICLE: **YEAR** 48. MAKE: **MODEL** 49. BODY STYLE: **COLOR** 50. STATE LIC. NO.: **STATE** 51. YEAR: **OTHER IDENTIFYING MARKS**

52. NAME OF DETECTIVE OR P.D. NOTIFIED: **MASCULINE** 53. TIME: **20:45** 54. NAME OF CORONER NOTIFIED: **DNA** 55. TIME: **DNA**

56. PHOTOGRAPHS TAKEN BY: **DNA** 57. PERSON IN CHARGE AT SCENE: **DNA** 58. TIME ARRIVED: **DNA** 59. INVENTORY NUMBER: **DNA**

60. NARRATIVE (BRIEF DESCRIPTION OF HOW CRIME WAS COMMITTED - IF COMPLAINT IS UNFOUNDED, EXPLAIN WHY):

B-1124 SENT TO 3904 W. VAN BUREN BY CC TO INVESTIGATE A RAPE VICTIM, ON INITIAL INTERVIEW VICTIM ALEXANDER, SHARON E. FN 1936 SHE STATED THAT SHE WAS WALKING EAST ON VAN BUREN AT 3722 WEST UNIT SHE WAS APPROACHED BY TWO COLORED MALES WHO STATED TO HER "GIVE ME YOUR MONEY" THEN ONE OFFENDER PUT HIS HAND OVER HER MOUTH AND BOTH FORCED HER TO THE REAR ENTRANCE TO A RESIDENT AT 3722 W. VAN BUREN WHERE SHE WAS RAPED.

61. EXTRA COPIES REQUIRED (NO. & RECIPIENT): **2** 62. DATE OF INVESTIGATION COMPLETED: **29 JAN 71** 63. TIME: **22:05** 64. DATE OF REPORTING: **30 JAN 71** 65. TIME: **11:15**

66. NAME: **STAR NO.** 67. NAME: **STAR NO.** 68. NAME: **STAR NO.** 69. NAME: **STAR NO.**

70. NAME: **STAR NO.** 71. NAME: **STAR NO.** 72. NAME: **STAR NO.** 73. NAME: **STAR NO.**

74. NAME: **STAR NO.** 75. NAME: **STAR NO.** 76. NAME: **STAR NO.** 77. NAME: **STAR NO.**

78. NAME: **STAR NO.** 79. NAME: **STAR NO.** 80. NAME: **STAR NO.** 81. NAME: **STAR NO.**

82. NAME: **STAR NO.** 83. NAME: **STAR NO.** 84. NAME: **STAR NO.** 85. NAME: **STAR NO.**

86. NAME: **STAR NO.** 87. NAME: **STAR NO.** 88. NAME: **STAR NO.** 89. NAME: **STAR NO.**

90. NAME: **STAR NO.** 91. NAME: **STAR NO.** 92. NAME: **STAR NO.** 93. NAME: **STAR NO.**

94. NAME: **STAR NO.** 95. NAME: **STAR NO.** 96. NAME: **STAR NO.** 97. NAME: **STAR NO.**

98. NAME: **STAR NO.** 99. NAME: **STAR NO.** 100. NAME: **STAR NO.** 101. NAME: **STAR NO.**

102. NAME: **STAR NO.** 103. NAME: **STAR NO.** 104. NAME: **STAR NO.** 105. NAME: **STAR NO.**

106. NAME: **STAR NO.** 107. NAME: **STAR NO.** 108. NAME: **STAR NO.** 109. NAME: **STAR NO.**

110. NAME: **STAR NO.** 111. NAME: **STAR NO.** 112. NAME: **STAR NO.** 113. NAME: **STAR NO.**

114. NAME: **STAR NO.** 115. NAME: **STAR NO.** 116. NAME: **STAR NO.** 117. NAME: **STAR NO.**

118. NAME: **STAR NO.** 119. NAME: **STAR NO.** 120. NAME: **STAR NO.** 121. NAME: **STAR NO.**

122. NAME: **STAR NO.** 123. NAME: **STAR NO.** 124. NAME: **STAR NO.** 125. NAME: **STAR NO.**

126. NAME: **STAR NO.** 127. NAME: **STAR NO.** 128. NAME: **STAR NO.** 129. NAME: **STAR NO.**

130. NAME: **STAR NO.** 131. NAME: **STAR NO.** 132. NAME: **STAR NO.** 133. NAME: **STAR NO.**

134. NAME: **STAR NO.** 135. NAME: **STAR NO.** 136. NAME: **STAR NO.** 137. NAME: **STAR NO.**

138. NAME: **STAR NO.** 139. NAME: **STAR NO.** 140. NAME: **STAR NO.** 141. NAME: **STAR NO.**

142. NAME: **STAR NO.** 143. NAME: **STAR NO.** 144. NAME: **STAR NO.** 145. NAME: **STAR NO.**

146. NAME: **STAR NO.** 147. NAME: **STAR NO.** 148. NAME: **STAR NO.** 149. NAME: **STAR NO.**

150. NAME: **STAR NO.** 151. NAME: **STAR NO.** 152. NAME: **STAR NO.** 153. NAME: **STAR NO.**

154. NAME: **STAR NO.** 155. NAME: **STAR NO.** 156. NAME: **STAR NO.** 157. NAME: **STAR NO.**

158. NAME: **STAR NO.** 159. NAME: **STAR NO.** 160. NAME: **STAR NO.** 161. NAME: **STAR NO.**

162. NAME: **STAR NO.** 163. NAME: **STAR NO.** 164. NAME: **STAR NO.** 165. NAME: **STAR NO.**

166. NAME: **STAR NO.** 167. NAME: **STAR NO.** 168. NAME: **STAR NO.** 169. NAME: **STAR NO.**

170. NAME: **STAR NO.** 171. NAME: **STAR NO.** 172. NAME: **STAR NO.** 173. NAME: **STAR NO.**

174. NAME: **STAR NO.** 175. NAME: **STAR NO.** 176. NAME: **STAR NO.** 177. NAME: **STAR NO.**

178. NAME: **STAR NO.** 179. NAME: **STAR NO.** 180. NAME: **STAR NO.** 181. NAME: **STAR NO.**

182. NAME: **STAR NO.** 183. NAME: **STAR NO.** 184. NAME: **STAR NO.** 185. NAME: **STAR NO.**

186. NAME: **STAR NO.** 187. NAME: **STAR NO.** 188. NAME: **STAR NO.** 189. NAME: **STAR NO.**

190. NAME: **STAR NO.** 191. NAME: **STAR NO.** 192. NAME: **STAR NO.** 193. NAME: **STAR NO.**

194. NAME: **STAR NO.** 195. NAME: **STAR NO.** 196. NAME: **STAR NO.** 197. NAME: **STAR NO.**

198. NAME: **STAR NO.** 199. NAME: **STAR NO.** 200. NAME: **STAR NO.** 201. NAME: **STAR NO.**

202. NAME: **STAR NO.** 203. NAME: **STAR NO.** 204. NAME: **STAR NO.** 205. NAME: **STAR NO.**

206. NAME: **STAR NO.** 207. NAME: **STAR NO.** 208. NAME: **STAR NO.** 209. NAME: **STAR NO.**

210. NAME: **STAR NO.** 211. NAME: **STAR NO.** 212. NAME: **STAR NO.** 213. NAME: **STAR NO.**

214. NAME: **STAR NO.** 215. NAME: **STAR NO.** 216. NAME: **STAR NO.** 217. NAME: **STAR NO.**

218. NAME: **STAR NO.** 219. NAME: **STAR NO.** 220. NAME: **STAR NO.** 221. NAME: **STAR NO.**

222. NAME: **STAR NO.** 223. NAME: **STAR NO.** 224. NAME: **STAR NO.** 225. NAME: **STAR NO.**

226. NAME: **STAR NO.** 227. NAME: **STAR NO.** 228. NAME: **STAR NO.** 229. NAME:

DEFENDERS AND TOLD HER IF SHE TELLS SHE
WOULD BE KILLED.
DEFENDERS, DES. AS. #1 MIN DARK COMPLEXION
WEARING A BROWN JACKET.
NO. 2 MIN LIGHT COMPLEXION ALSO WEARING A
BROWN JACKET, BOTH IN LATE TEENS
VICTIM WITH HER MOTHER TRANSPORTED TO OCH.
ALL NOTIFICATIONS WERE MADE.

090-11 119(97)-7/99

3904 W. Van Buren 2nd

644 III6
- 722-0037

ARRESTING OFFICERS:

Inv. M. Conroy #12566 YD# 4, Inv. J. Toughy #4738
YD# 4, Inv. F. Discoli #9526 YD# 4, Inv. C. Ahern
#6556 YD# 4.


CHARGES/DATE/BR:

Rape, (2 counts), Armed Robbery, Theft, set for branch #43, on 26 Feb 1971. Bond set at \$10,000 USC.

EVIDENCE IDENTIFIED:

Photographs of show-up held at the OIIth dist. by
ET 2357 on 31 Jan 1971.

INVESTIGATION:

INVESTIGATION:  The undersigned officer assigned to investigate a rape victim at the OCH on 29 Jan 1971 at 2130 hrs. by Sgt. Broderson. On arrival at the hospital the victim was identified as Sharon Alexander, and in an interview with her with her mother Annette Alexander present the following was learned.

The victim Sharon stated that she had just left the area of Madison and Pulaski after shopping and was on her way home, South on Pulaski when she first observed the two offenders, one of whom she knew as BROWDER, as she knew his sister, and that he lived in the 4000 block of N. Monroe St.. The second she did not know and was only able to give an identification of his being a N/N, T light complexion and wearing a brown jacket.

She stated that the offenders approached and the unknown M/N slapped her in the face after asking her for her money. Both of the offenders fled and that she continued on her way home. She said that she was in the 3900 block of Van Buren St. at about 1922 west when the same two offenders grabbed her and forced her into the gangway, searched her and took \$3.00 UIC from her pocket and then threw her on the ground where she was forced to have sex relations with the subject BROWDER first and then the unknown M/N. She stated that BROWDER threaten her with a gun, and told her that they would kill her if she were to tell anyone. She said that upon the offenders finishing, they fled thru the alley and that she ran home and called the police.

Victim taken to the CCH by MB II29, Off. Hladzuk
#II12 & Co. Victim examined by Dr. Gray and was negative for sperm and Trauma. With the information supplied by the victim, the undersigned officer contacted and enlisted the aid of Youth officer W. Conroy relative to his knowledge of the teens and gangs the hang in the area of Pulaski and Monroe St.. Officer Conroy advised that he knew of a BROWDER family that lived at 4053 W. Monroe St. and that he would attempt to locate one of the sons about 17 years old. On 31 Jan 1971, the undersigned officer contacted by Off Conroy and advised that he had contacted the family and ~~had~~ spoke to the mother Mrs. Lucille Browder. He advised her of the circumstances and she ~~advised~~ stated that only one of her sons seemed possible of such a thing and identified him as Ben E. Browder. Officer Conroy stated that he had brought Ben E. Browder and his brother Tyrone Browder into the OIIt dist and had contacted the victim, ~~Thorn~~ Alexander to ~~make~~ in the dist. for a show-up.

The undersigned also advised by Off Conroy, that Off. Wm. James #2775 of the OII th dist. had observed the subject Ben E. Browder and noted that he fitted the description of 60 : 02 who was last on his right wrist and that was wanted for a rape committed on 30 Jan 1971 at 448 S. Adams St.. Officer Conroy stated that he checked this out and found that a rape was committed at 448 S. Adams St. on 30 Jan 1971 at 1745 hours. RD# K 038570, Victim a Johnnie Mae Johnson F/W/O of 4144 W. Adams St.. Description of offender was a W/O/17, wearing a cast on the right

RAPE/FORCIBLE
ALEXANDER, Sharon E.
CONT'

3904 W. Van Buren 2nd

III6
722-0037

ET #2357 assigned to take photographs of the line-up at the OII dist. Subjects used in the line-up were as follows. LEFT to RIGHT

#1 BROWDER, Tyrone M/N dob. 31 May 1954 of 4053 W. Monroe St.
#2 POLK, Stanley M/N dob. 5 Mar 1954 of 4010 W. Monroe St.
#3 BROWDER, Ben E. M/N dob. 24 Mar 1953 of 4053 W. Monroe St. (SUSPECT)
#4 DALE, Milton M/N dob. 29 Aug 1950 of 4459 W. Madison St.
#5 LOVE, John M/N dob. 16 May 1953 of 5439 W. Adams St.

Both of the victims appeared at the dist. station and viewed the line-up separately and positively identified the subject Ben E. Browder as the offender who had raped them. In addition, the mother of Sharon Alexander upon seeing Ben E. Browder in the line-up, identified him as the person who stole her purse on 21 Jan 1971. Rd# K 026509.

The subject Ben E. Browder had been advised of his constitutional rights in it's entire and made an oral admission to the rape of Johnnie Mae Johnson.

The victim Johnnie Mae Johnson was interviewed by the undersigned officer and related that on 30 Jan 1971 at 1745 hours she was coming home from the store and was on Adams St. just East of Keeler, when she was grabbed from behind by a M/N/I7 who was armed with a gun. She stated that the offender, now identified as Ben E. Browder hit her over the head with the gun and called her a "BITCH", and told her not to look at him. She said that this offender forced her to walk into the gangway to the rear of 4148 W. Adams St. and into a basement. He then forced her to take off her pants and lie on a mattress that was lying on the floor. She said that she was forced to have sex relations with the offender and that when he was finished he asked her for her money and then took \$1.90 USD, a quantity of bus tokens and a yellow watch which belonged to her boyfriend. She stated that he then took her out of the basement to the alley and then left her. She stated that she then went home and called the police and was taken to the hospital, GCN by 1b III4 were tests conducted by Dr. Kaji revealed victim positive for sperm and Trauma.

Browder was charged with two (2) counts of rape and one of Armed robbery and one of theft. He appeared in holiday court on 1 Feb 1971 and was continued to Branch #43 on 26 Feb 1971, Bond set at \$10,000.

It is recommended by the undersigned officer that this case (K 037289) and (K 038570) be CLEARED.

REPORT OF:

Inv. Stan T. #9737 M/S 4 CID.

60:02 2:03 11.

NO. 12
CLEARED
HOMICIDE 4

Supplementary Report / Chicago Police

Petitioner's Exhibit 3

1. OFFENSE/CLASSIFICATION ON LAST PREVIOUS REPORT: RAPE FORCIBLE

2. OFFENSE/CLASSIFICATION AS OF THIS DATE (IF SAME AS NO. 1, WRITE SAME): RAPE FORCIBLE

3. BEAT OR UNIT ASSIGNED: 8413

4. BEAT OR OCCURRENCE: 1113

5. VICTIM'S NAME AS SHOWN ON CASE REPORT: ALEXANDER, SHARON F/N 1936

6. CORRECT NAME: DINA

7. VICTIM'S ADDRESS: 3904 W. VanBuren

8. PHONE NO.: 722-0037

9. DATE OF THIS REPORT: 31 Jan 1971

10. DATE REPORTING OFFICER: 29 Jan 1971

11. TYPE OF LOCATION WHERE OFFENSE OCCURRED (REFER TO CASE REPORT): DINA

12. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

13. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

14. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

15. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

16. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

17. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

18. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

19. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

20. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

21. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

22. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

23. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

24. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

25. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

26. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

27. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

28. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

29. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

30. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

31. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

32. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

33. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

34. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

35. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

36. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

37. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

38. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

39. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

40. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

41. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

42. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

43. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

44. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

45. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

46. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

47. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

48. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

49. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

50. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

51. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

52. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

53. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

54. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

55. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

56. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

57. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

58. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

59. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

60. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

61. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

62. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

63. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

64. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

65. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

66. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

67. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

68. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

69. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

70. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

71. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

72. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

73. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

74. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

75. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

76. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

77. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

78. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

79. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

80. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

81. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

82. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

83. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

84. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

85. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

86. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

87. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

88. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

89. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

90. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

91. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

92. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

93. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

94. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

95. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

96. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

97. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

98. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

99. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

100. IS SUBJECT A CHA/STREET? YES ☐ NO ☒ DINA

ON VIEW ARREST BY AREA 4 YOUTH DIVISION CARS 8413 & 8414

SUPPLEMENTARY REPORT # 1.

COMPLAINANT: Annette Alexander F/N 1936 of 3904 W. VanBuren. 722-0037

PERSONS ARRESTED: #1. BROWDER, BEN M/N 1953 of 4053 W. Monroe St.
#2. BROWDER, TYRONE M/N 1954 of 4053 W. Monroe St.
#3. POLK, STANLEY M/N 1954 of 4020 W. Monroe St.
#4. DALE, MILTON M/N 1950 of 4459 W. Madison St.

CHARGES: Chapter 38, Section 14-1 RAPE

ARRESTING OFFICERS: F. O'Driscoll 9526, M. Conroy 12566, J. Toaghey 473
G. Ahern 6556.

NARRATIVE: The reporting officers received information from a known informer that the boy's that rape a girl at 3922 W. VanBuren were known by the above names. The officers checked with AREA 4 & KCS

30. ENTER CENTRAL RECORDS, FBI NUMBER OR ADVISE DISTRICT ADJUTANT (FBI NUMBER OF ALL REPORTING OFFICERS MUST BE ENTERED IN THIS SECTION)

31. EXTRA COPIES REQUIRED (IF ANY) (NO & REASON)

32. DATE INVESTIGATION COMPLETED

33. REPORTING OFFICER

34. REPORTING OFFICER

35. REPORTING OFFICER

36. REPORTING OFFICER

37. REPORTING OFFICER

38. REPORTING OFFICER

39. REPORTING OFFICER

40. REPORTING OFFICER

41. REPORTING OFFICER

42. REPORTING OFFICER

43. REPORTING OFFICER

44. REPORTING OFFICER

45. REPORTING OFFICER

46. REPORTING OFFICER

47. REPORTING OFFICER

48. REPORTING OFFICER

49. REPORTING OFFICER

50. REPORTING OFFICER

51. REPORTING OFFICER

52. REPORTING OFFICER

53. REPORTING OFFICER

54. REPORTING OFFICER

55. REPORTING OFFICER

56. REPORTING OFFICER

57. REPORTING OFFICER

58. REPORTING OFFICER

59. REPORTING OFFICER

60. REPORTING OFFICER

61. REPORTING OFFICER

62. REPORTING OFFICER

63. REPORTING OFFICER

64. REPORTING OFFICER

65. REPORTING OFFICER

66. REPORTING OFFICER

67. REPORTING OFFICER

68. REPORTING OFFICER

69. REPORTING OFFICER

70. REPORTING OFFICER

71. REPORTING OFFICER

72. REPORTING OFFICER

73. REPORTING OFFICER

74. REPORTING OFFICER

75. REPORTING OFFICER

76. REPORTING OFFICER

77. REPORTING OFFICER

78. REPORTING OFFICER

79. REPORTING OFFICER

80. REPORTING OFFICER

81. REPORTING OFFICER

82. REPORTING OFFICER

83. REPORTING OFFICER

84. REPORTING OFFICER

85. REPORTING OFFICER

86. REPORTING OFFICER

87. REPORTING OFFICER

88. REPORTING OFFICER

89. REPORTING OFFICER

90. REPORTING OFFICER

91. REPORTING OFFICER

92. REPORTING OFFICER

93. REPORTING OFFICER

94. REPORTING OFFICER

95. REPORTING OFFICER

96. REPORTING OFFICER

97. REPORTING OFFICER

98. REPORTING OFFICER

99. REPORTING OFFICER

100. REPORTING OFFICER

SIGN OF NARRATIVE

and obtained copy's of the case report. After checking with the victim the office received additional information as to the description of the offenders. The officers went to 4053 W. Monroe St. and interviewed Ben Browder M/N 1953 who fit the description of the offender. While at the Browder home the officers met the above three M/N who volunteered to stand the Show-up that was conducted at the 11th Dist. All the offenders where then taken to the 11th. Dist., and informed of their constitutional rights. The victims of the crimes where contacted and came into the 11th. Dist. to view the show-up. The show-up was held in the square room of the district. After the show-up the victims identified BROWDER, BEN M/N 1953 as the offender of the rape. The crime lab was contacted and ET Kubach took a photo of the show-up. The Area H&S unit was notified and Inv. Thomas arrived at the dist. and prepared charges against the offender. Complaints were signed by the victim and the offender was booked for Br. 43. The above case to cleared by Area 4 H&S reports.

IDENTENCE REPORT # 1922

TIME INVESTIGATION STARTED: 1800 Hrs.

TIME INVESTIGATION ENDED: 2230 Hrs.

TOTAL TIME: 2+ Hrs.

12.22 11 5 721

ME. 12

NO

K-037289

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

(TITLE OMITTED IN PRINTING)

ORDER

Following an evidentiary hearing and further argument by the parties the court finds that the writ of habeas corpus was properly issued on October 21, 1975. The motion to reconsider is therefore DENIED. Accordingly, the writ shall issue with execution stayed for five days pending prompt filing of notice of appeal and application to the Court of Appeals for a further stay. The court further finds that petitioner's request for fees pursuant to 28 U.S.C. § 1937 is not justified and is hereby DENIED.

DATED: January 26, 1976

/s/ Joel M. Flaum

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

(TITLE OMITTED IN PRINTING)

NOTICE OF APPEAL

Notice is hereby given that respondent, above named, by his attorney, WILLIAM J. SCOTT, Attorney General of the State of Illinois, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the orders issuing a writ of habeas corpus entered in this action, October 21, 1975 and January 26, 1976.

Respectfully submitted,

WILLIAM J. SCOTT
Attorney General
State of Illinois

By: /s/ Raymond McKoski
Assistant Attorney General
188 West Randolph St. (2200)
Chicago, Illinois 60601
(312) 793-2570

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

January 30, 1976

Before

HON. THOMAS E. FAIRCHILD, *Chief Judge*
HON. LUTHER M. SWYGERT, *Circuit Judge*
HON. WALTER J. CUMMINGS, *Circuit Judge*

UNITED STATES OF AMERICA, ex rel.
BEN EARL BROWDER,
Petitioner-Appellee,

vs.

DIRECTOR, DEPARTMENT OF CORREC-
TIONS, State of Illinois,
Respondent-Appellant.

No. 76-1089
(75 C 69)

This matter comes before the court on the "Emergency Motion To Stay Execution Of Writ Of Habeas Corpus Pending Appeal" filed herein on January 28, 1976 by counsel for the respondent-appellant. On consideration whereof, this Court being fully advised in the premises,

IT IS ORDERED that said emergency motion be, and the same is hereby, DENIED. This appeal will, however, be expedited in accordance with the following schedule:

* * *

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Argued February 27, 1976

April 28, 1976.

Before

HON. WALTER J. CUMMINGS, *Circuit Judge*

HON. ROBERT A. SPRECHER, *Circuit Judge*

HON. WILLIAM E. STECKLER, *Chief District Judge**

(TITLE OMITTED IN PRINTING)

ORDER

The respondent-appellant, Director of the Department of Corrections of the State of Illinois, appeals from an order of the District Court for the Northern District of Illinois granting the issuance of a writ of habeas corpus.

Petitioner-appellee, Ben Earl Browder, was convicted by a jury in the Cook County Circuit Court on August 27, 1971, for the rape of one Johnnie Mae Johnson. He was sentenced to a term of not less than four nor more than fifteen years in the Illinois State Penitentiary. The conviction was affirmed by the Illinois Appellate [2] Court for the First District, the court holding that since the propriety of his arrest was not raised in the trial court it could not be raised on appeal. *People v. Browder*, 13 Ill. App.3d 198, 300 N.E.2d 511 (1st Dist. 1973) (abstract only). Review was denied without opinion by the Illinois Supreme Court. *People v. Browder*, Cause No. 46103 (November 29, 1973). Petitioner's post-conviction petition alleging that he was denied the effective assistance of counsel and of his constitutional right to counsel at his line-up identification was also dismissed. The dismissal was affirmed by the Illinois Appellate Court. *People v. Browder*, 29 Ill. App.3d 596, 331 N.E.2d 162 (1st Dist. 1975) (abstract only).

* Honorable William E. Steckler, Chief Judge for the Southern District of Indiana, is sitting by designation.

The petition for writ of habeas corpus was filed in the district court alleging that there was no probable cause for petitioner's arrest. In response respondent filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6). This motion was denied on October 21, 1975, with the district court issuing the writ of habeas corpus, staying execution of the writ for sixty days. On November 18, 1975, respondent filed a motion to conduct an evidentiary hearing as to whether or not there was probable cause for petitioner's arrest. The motion was granted along with a motion to further stay execution of the writ and an evidentiary hearing was held on January 7, 1976, as to whether probable cause for the arrest was present. On January 26, 1976, the court ordered the writ to issue with execution stayed for five days. Notice of appeal was filed on January 27, 1976. After this court denied a further stay of execution the writ issued on January 30, 1976.

[3] At the evidentiary hearing petitioner submitted into evidence the state court record and rested his case. Respondent introduced testimony of investigating police officers in support of probable cause for the arrest. These officers testified that on January 29, 1971, Sharon Alexander reported that she was raped in Chicago, Illinois. She described the assailants to James Newson, a Chicago police officer, as two black males, one light complected and one dark complected, both wearing brown jackets and both in their late teens. Officer Newson then took Miss Alexander to the Cook County Hospital. Later that same day Sharon Alexander at the hospital told Investigator Stan Thomas of the Chicago Police Department that one of her attackers was named "Browder," was about seventeen years of age and lived in the 4000 block of West Monroe. She stated that she knew the offender's name and where he lived because she knew his sister. Officer Conroy of the Youth Division of the Chicago Police Department checked the Youth Division files and found the name of a Tyrone Browder who lived at 4053 West Monroe Street and was sixteen years old. Officer Conroy then interviewed Miss Alexander who once again stated that one offender's last name was "Browder" and that he lived in the 4000 block of West Monroe. Officer Conroy called Lucille Browder, the mother of Tyrone Browder, who stated that she did not think Tyrone would be the assailant but that it might be Ben Earl, [4] her other

son.¹ Ben Earl Browder was seventeen years old at the time.

The evidence shows that Officer Conroy, along with three other police officers, went to the Browder home, identified themselves and were admitted by Lucille Browder. Both Browder brothers denied knowledge of the rape, and they and two other teenaged black males at the home were placed under arrest and given the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966). At the police station an Officer James noticed that Ben Earl Browder fit the description of an individual, a male Negro, seventeen years old, with a cast on his right arm, who had raped Johnnie Mae Johnson on January 30, 1971. At the line-up Ben Earl Browder was identified by both Sharon Alexander and Johnnie Mae Johnson as their assailant. Immediately after the line-up petitioner called Officer Conroy to the side and began to confess to the rape of Johnnie Mae Johnson. Officer Conroy stopped petitioner by saying "Now wait a minute," and re-advised him of his *Miranda* rights. Petitioner then confessed to raping Johnnie Mae Johnson but denied raping Sharon Alexander. Officer Conroy then summoned Investigator Thomas. After being advised of his *Miranda* rights for the third time Ben Earl Browder once again stated that he raped Johnnie Mae Johnson.

[5] In order for the arrest to be valid and its "fruits" to be admissible there must be probable cause for the arrest.² Probable cause has been defined as facts and circumstances "sufficient to warrant a prudent man in believing that the [suspect] had committed . . . an offense." *Gerstein v. Pugh*, 420 U.S. 103, 111 (1975), quoting from *Beck v. Ohio*, 379 U.S. 89, 91 (1964). These probabilities "are not technical; they

¹ At the district court's evidentiary hearing, Lucille Browder testified on rebuttal that she did not make such a statement and that she did not recall if she spoke to Conroy on the telephone prior to the arrest. Even if said statement were made, it would not constitute probable cause. This remark is distinguishable from the case respondent relies on, *Naples v. United States*, 307 F. 2d 918 (D.C. Cir. 1962), wherein defendant's brother stated his brother "had done something awful," and that he usually carried a knife in an overnight bag.

² Respondent contends that even if there was no probable cause for the arrest, the confession would be admissible under *Brown v. Illinois*, 422 U.S. 590 (1975). In light of our decision in the instant case the court need not consider whether there was an untimely appeal as to this issue.

are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar v. United States*, 338 U.S. 160 (1949). See also, *United States v. Ganter*, 436 F. 2d 364 (7th Cir. 1970).

Petitioner contends that the arrest of all four youths present at the Browder home indicates that the investigation had not focused on petitioner and was thus a "dragnet" arrest, held in *Mallory v. United States*, 354 U.S. 449 (1957), and *Davis v. Mississippi*, 394 U.S. 721 (1969), to be violative of the Fourth Amendment.

Petitioner's reliance on *Mallory v. United States*, *supra*, is misplaced. There the defendant was not informed of his right to counsel, his right to a preliminary examination and his right to remain silent and that any statement he might make could be used against him. Even though Mallory was arrested in the early afternoon, it was not until he confessed, some seven to eight hours after [6] his arrest, that the police attempted to reach a United States magistrate for the purpose of arraignment. The court in reversing the conviction held this to be in conflict with Federal Rule of Criminal Procedure 5(a), the right to a prompt arraignment.³

In *Mallory* the court did not hold that the police must narrow the focus to just one person for probable cause to exist. Petitioner relies on the statement of the Supreme Court that:

"It is not the function of the police to arrest, as it were, at large and to use an interrogating process at police headquarters in order to determine whom they should charge before a committing magistrate on 'probable cause.'" 354 U.S. at 456 (1957).

An analysis of the Supreme Court's opinion in *Mallory*, *supra*, as well as the appellate court's opinion, *Mallory v. United States*, 236 F. 2d 701 (D.C. Cir. 1956), indicates that the Supreme Court used the above-cited language in response to a prosecution argument that the reason the defendant was not promptly arraigned was because the police wanted to interrogate the witness to find probable cause before bringing him before a magistrate. The Court merely

³ Federal Rule of Criminal Procedure 5 does not apply in the case at hand as it was a state criminal proceeding.

held that this does not excuse the failure to provide a prompt arraignment before the arrest.

The "multiple arrest" in the case before us is also distinguishable from *Davis v. Mississippi, supra*. In that case at least twenty-four black youths were taken to police headquarters for fingerprinting after the victim "could give no better description [7] of her assailant than that he was a Negro youth." 394 U.S. at 722. The defendant's conviction was reversed because the court held that the Fourth Amendment applies to involuntary detentions occurring at the investigatory stage as well as at the accusatory stage and that there was no probable cause.

In the instant case the police had more evidence than that the assailant was a "Negro youth." Even though there were slight differences in the testimony of Officer Conroy at the evidentiary hearing from the arrest report and the trial, the police had probable cause to believe the assailant was either Ben Earl Browder or his brother, Tyrone Browder, between whom a physical resemblance was noted. In *Davis* the police had fingerprinted twenty-four Negro youths and interrogated "40 or 50 other Negro youths."

Judged by the "factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act," we conclude that the arresting officers, as a result of Sharon Alexander's statements and the police investigation, had probable cause to believe Ben Earl Browder committed the crime. *Brinegar v. United States, supra*. The police had his description, his last name and location of the block on which he lived. The arrest was therefore valid and the subsequent confession was admissible.

For the foregoing reasons the order granting the writ of habeas corpus is REVERSED.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

June 18, 1976

Before

HON. WALTER J. CUMMINGS, *Circuit Judge*

HON. ROBERT A. SPRECHER, *Circuit Judge*

HON. WILLIAM E. STECKLER, *District Judge*

(TITLE OMITTED IN PRINTING)

On consideration of the petition of the Petitioner-Appellee, United States of America, ex rel. Ben Earl Browder, for a rehearing by the Court in the above-entitled appeal, and no member of the panel and no judge in regular active service having requested that a vote be taken on the suggestion for an *en banc* rehearing, and the panel having voted to deny a rehearing.

IT IS ORDERED that the petition of Petitioner-Appellee for a rehearing in the above-entitled appeal be, and the same is hereby DENIED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

(TITLE OMITTED IN PRINTING)

PETITIONER'S MOTION THAT A DECISION BY UNPUBLISHED
ORDER BE ISSUED AS A PUBLISHED OPINION

Petitioner, by counsel, requests that the decision in this case by unpublished order be issued as a published opinion.

As grounds for this motion, petitioner states as follows:

1. The unpublished order in this case involves an issue of continuing public interest, i.e., the authority of police to make warrantless, multiple suspect arrests whenever they suspect that one of several persons had committed an offense, but where the evidence is insufficient to constitute grounds for the arrest of a single suspect. *See ALI, A Model Code of Pre-Arrest Procedure* (1975), Art. 170.

2. The decision of this Court upholds the warrantless arrest of at least two persons so that they could be placed in a lineup to determine which one, if either, should be charged. Notwithstanding Circuit Rule 28, there is no question that police officers may rely on the disposition of this case in regulating their conduct in the future, and continuing to make the type of arrests at issue in this case. The decision should therefore be published, so that the state courts may, if they choose, fashion procedures to protect the citizenry from the investigatory arrests sanctioned by this Court. *See Ariz. Rev. Stat. Ann. 13-1424* (1973 Supp.); *Idaho Code* § 19-625 (1975 supp.); *N.C. Gen. Stats. § 15A-271 et seq.*

3. The unpublished order in this case established a new rule of law, as it is the first case in this circuit to be concerned with an arrest of two persons to determine which one, if either, should be charged with an offense.

4. The decision in this case reverses a decision of a district judge; absent a decision of precedential effect, it is likely that another district judge in a similar case would reach the same result as the district judge in this case, again

requiring reversal by this Court. Uniformity of decisions requires that the unpublished order be published.

Respectfully submitted,

/s/ Kenneth N. Flaxman

5549 North Clark Street
Chicago, Illinois 60640
(312) 728-3525

One of the attorneys for petitioner

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

July 9, 1976

Before

Hon. WALTER J. CUMMINGS, *Circuit Judge*

(TITLE OMITTED IN PRINTING)

This matter comes before the court on the "PETITIONER'S MOTION THAT A DECISION BY UNPUBLISHED ORDER BE ISSUED AS A PUBLISHED OPINION" filed herein on June 28, 1976 by counsel for the petitioner-appellee. On consideration whereof, this Court being fully advised in the premises.

IT IS ORDERED that the aforesaid motion of the petitioner-appellee be, and the same is hereby, DENIED.

SUPREME COURT OF THE UNITED STATES

No. 76-5325

BEN EARL BROWDER, *Petitioner,*

v.

DIRECTOR, DEPARTMENT OF CORRECTIONS
OF ILLINOIS

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Seventh Circuit.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

January 25, 1977